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No. 7099

United States
Circuit Court of Appeals
For the Ninth Circuit

IN THE MATTER OF SECURITY BUILDING & LOAN ASSOCIATION, a corporation,
Alleged Bankrupt,
SECURITY BUILDING & LOAN ASSOCIATION, a corporation,
Appellant,
vs.
JOHN H. SPURLOCK, et al,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLANTS

HENDERSON STOCKTON,
Attorney for Appellant
Security Building & Loan
Association, a corporation.
ALEXANDER B. BAKER,
LOUIS B. WHITNEY,
LAWRENCE L. HOWE,
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Ben H. Dodt, State Court
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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLANTS

STATEMENT OF THE CASE

(In this brief all figures appearing in parentheses refer to pages in the printed Transcript of Record. Security Building & Loan Association, a corporation, is in this brief referred to, for brevity's sake, as "Association.")

This is a bankruptcy case instituted by John H. Spurlock, Ted Dempsey and W. L. Selman by the

filing of an involuntary petition in bankrutcy in the United States District Court for the District of Arizona on the 5th day of January, 1932 (1-6).

These petitioning creditors with leave of court on February 1, 1932, filed an amended involuntary petition (23-28). On January 21, 1932, after an order of the court authorizing them so to do, Mary Rose, Ray L. Rose and Joe Ramos, as intervening creditors, filed an involuntary petition in bankruptcy (14-22).

In the original petition and in the amended petition of Spurlock, Dempsey and Selman, it is alleged that Association "is a corporation, duly created and existing under and by virtue of the laws of the State of Arizona * * * and has been engaged in the business of issuing certificates of indebtedness agreeing to pay thereon six per cent per annum, and with the provision of the withdrawal of sums deposited upon said certificates on notice and making loans upon real estate and otherwise doing a general building and loan business." In the amended petition, however, between the words quoted "is a" and "corporation," is added "moneyed and business." In intervening creditors (Mary Rose, Ray L. Rose and Joe Ramos) involuntary petition it is alleged that Association "is a moneyed and business corporation organized under and pursuant to the laws of the state of Arizona * * * and is principally engaged in the building and loan association business and the lending of money as such

building and loan association upon real estate for the improvement thereof and other purposes, and has been duly incorporated for that purpose." (14). Motions to dismiss the hereinbefore mentioned original and amended involuntary petition and intervening creditors involuntary petition were seasonably filed by Association and by State Court Receiver Ben H. Dodt (7-8, 29-31, 41-46). The ground upon which dismissal was sought in said motions was that the United States District Court was without jurisdiction because Association was a building and loan association and therefore not subject to be adjudged a bankrupt under Section 4 of the Bankruptcy Act of July 1, 1898, as amended February 11, 1932. On February 13, 1932, upon a hearing of said motions, an order was duly given, make and entered by the United States District Court reading, "It is ordered that said alleged bankrupt's motion to dismiss amended creditors petition in bankruptcy and said alleged bankrupt's motion to dismiss intervening creditors involuntary petition filed January 21, 1932, will be granted unless the petitions of creditors be amended to show the jurisdiction of this court and filed within ten days from and after this date." (39).

Spurlock, Dempsey and Selman, the original petitioning creditors, did not file any amended involntary petition as required by the order of the court, but on February 23, 1932, there was filed herein (58) an instrument dated "Phoenix, Arizona, February 15, 1932. Mr. Lemuel P. Mathews,

Atty., Phoenix, Arizona. Dear Mr. Mathews: Regarding Case No. B-629 Phoenix in the District Court of the United States for the Federal District of Arizona—Security Bldg. and Loan Assn. alleged Bankrupt. Please be advised that we the undersigned, do not wish to amend the proceedings already filed, neither do we want you to sign our names or allow our names to be used further in this matter. We have been told of the recent act of congress exempting Building and Loan Ass'ns from Bankruptcy. You are hereby advised and instructed not to amend the proceedings already filed and also not to file any other proceedings in our names and to do nothing further in the matter. Yours very truly, W. L. Selman, Ted Dempsey, J. H. Spurlock." Original petitioning creditors have not participated in this case subsequent to February 23, 1932, notwithstanding the United States District Court refused to dismiss their involuntary petition upon motion made at the commencement of the trial of this case on May 24, 1932 (157-159).

On February 19, 1932, intervening creditors, Mary Rose, Ray L. Rose and Joe Ramos, filed a petition for leave to amend their involuntary petition and on said date an order was entered permitting them so to do (46-48). On February 20, 1932, said intervening creditors filed their amended involuntary petition (49-57). On March 14, 1932, Association filed its answer to intervening creditors amended involuntary petition (59-103). On March

14, 1932, Lillian M. Erwin filed petition for leave to intervene and on said date obtained an order permitting her to intervene (104-106). On March 14, Lillian M. Erwin filed an involuntary petition (106-114). March 15, 1932, Luther M. Frink, E. Dale Frink, John H. Digges, Billie Leiber, Hattie M. Leiber, Hattie Schneider Leiber, Henry F. Leiber, Henry Leiber, Jr., and Herman Leiber filed an involuntary petition joining with the amended petition of Mary Rose, Ray L. Rose and Joe Ramos, pursuant to order of the court permitting them so to do (115-128). A stipulation was entered into between counsel that the answer of alleged bankrupt to amended petition of intervening creditors Mary Rose, Ray L. Rose and Joe Ramos should stand as an answer to involuntary petition of intervening creditor Erwin (129) and also to joining involuntary petition of Luther M. Frink and the others named joining with him (147-148). On May 23, 1932, Ben H. Dodt, State Court Receiver, filed answer to all creditors and intervening creditors amended involuntary petitions (149-157).

The case was tried beginning May 24, 1932, upon the amended petition of Mary Rose, Ray L. Rose and Joe Ramos filed February 20, 1932 (49-57) and upon involuntary petition of Lillian M. Erwin filed March 14, 1932 (106-114) and upon petition of Luther M. Frink and those other persons with him associated, filed March 15, 1932 (115-128), and upon the answer of Association filed March 14, 1932 (59-103) and upon the an-

swer of Ben H. Dodt, State Receiver, filed May 23, 1932 (149-157).

An examination of the original petition filed by intervening creditors Mary Rose, Ray L. Rose and Joe Ramos, and their amended petition, shows that these creditors about faced and, whereas they alleged in the original petition that Association was a building and loan association, in their amended petition they alleged that Association "is a moneyed and business corporation organized under and pursuant to the laws of the State of Arizona, and is not a municipal, railroad, insurance or banking corporation, or building and loan association, and is principally engaged in lending money on notes secured by mortgages upon real estate, and has been duly incorporated for that purpose" (49). The allegation of the involuntary petition of intervening creditor Lillian M. Erwin is substantially the same as that just quoted (106). The allegations of the joining petition of intervening creditors Luther M. Frink and those associated with him are as set forth in paragraph numbered "First" (123), that the Association "is a moneyed and business corporation organized under the laws of the State of Arizona, and is not a municipal, railroad, insurance or banking corporation, and is not a building and loan association, and is principally engaged in the business of loaning money upon notes secured by mortgages on improved and unimproved real estate throughout the State of Arizona," and, as set forth in paragraph numbered "Second" (123, 124, 125),

"That although said Security Building and Loan Association purports by its name to be a building and loan association, said corporation in truth and in fact is not and never has been a building and loan association, nor has it ever conducted or engaged in the business of a building and loan association, and that this is so for the following reasons, among others: That there has never been any completion of an organization of said corporation as a building and loan association under the laws of the State of Arizona, or at all, and that said corporation was not organized for the purposes for which a building and loan association was, or is, authorized to be incorporated under the laws of Arizona, and that said corporation never completed its organization and never qualified itself to do business as a building and loan association in accordance with the laws of Arizona, or at all. That no membership stock in said corporation has ever been subscribed for or issued; that no board of directors of said corporation has ever been elected in compliance with the provisions of the laws of the State of Arizona relating to the organization and conduct of the business of building and loan associations; that no stock in said corporation has ever been issued to the borrowers of money who have given notes and mortgages on real estate for the security of moneys loaned to them; and that the only capital stock ever issued by said corporation was 500 shares of the par value of $100.00 per share, which stock purported to be fully paid up stock, and was issued under the general incorpora-

tion laws of the State of Arizona, and not under the building and loan association laws; that according to the articles of incorporation of said corporation and its by-laws, said stock so issued had a right to all the dividends and profits of the corporation and to control the election of directors and the business in general of said corporation, all in contravention of the provisions of the statutes of Arizona with respect to the incorporation of and control of business by building and loan associations; that the only business in which said corporation has been engaged and which it has conducted and carried on is a general business of loaning money on real estate, and that in carrying on its said business, it has loaned money on improved real estate in amounts greatly in excess of sixty per cent of the conservative market value of said real property; that it has made loans on unimproved real estate without having made any contracts for the improvement of said land, and without having said land appraised by three appraisers who were members of said association, and the said corporation in the conduct of its general loaning business made two loans aggregating $66,000.00 in amount, secured by two mortgages on 240 acres of unimproved desert land near Wellton, in Yuma County, Arizona, said land being of an assessed value of only $10.00 per acre. That no loan has ever been made by said corporation in accordance with the regulations prescribed and required by the Statutes of Arizona for the loaning of money by building and loan associations."

Both the answer of Association and of Ben H. Dodt, State Receiver, puts in issue the quoted allegations of the foregoing petitions. The issue thus raised was the only issue tried and was the only issue in the case. All of the intervening creditors alleged in substance, which allegations were admitted, that the consideration for their several debts was on account of money loaned to the Association at its special instance and request, the amount being evidenced by certificates, giving the number, known as "pass book certificates." The act of bankruptcy consisting of suffering and permitting a receiver to be appointed in the state court, was admitted. Other alleged acts of bankruptcy were denied. All essential facts were admitted except the question whether or not the Association was, under Section 4 of the Bankruptcy Act of July 1, 1898, as amended February 11, 1932, subject to be adjudged a bankrupt. There was no evidence offered in relation to alleged acts of bankruptcy which were denied. In fact, the evidence was confined to the single issue of whether or not the Association was exempted from the provisions of the Bankruptcy Act of July 1, 1898, as amended, authorizing involuntary adjudication.

STATEMENT OF FACTS

Association was incorporated under and pursuant to Chapter 76 of the 1925 Session Laws of Arizona, Regular Session, Seventh Legislature,

which said chapter is entitled: "To Provide for the Organization of Building and Loan Associations; Regulating and Defining the Duties and Obligations of the Members, Directors and Officers of said Associations; Prescribing the Power of the Superintendent of Banks over said Associations; Prohibiting the doing of Business by any Company not Qualifying under this Act and Prescribing a Penalty for the Violation thereof; and Repealing all Acts and parts of Acts in Conflict with the Provisions of this Act." Defendant's Exhibit B in evidence (716-734). Chapter 76 of the 1925 Session Laws of the Regular Session of the Seventh Legislature of the State of Arizona has been revised and, as revised, is now Article 4 of Chapter 14 of the Revised Code of Arizona, 1928, entitled, "Building and Loan Associations," Sections 612-628, both inclusive, effective July 1, 1929.

Articles of Incorporation of Association were signed and acknowledged as deeds of real property are required to be signed and acknowledged on the 5th day of March, 1929, by Louis T. Beach, E. T. Cusick, W. C. Evans, J. C. Barnes and H. V. Bell (81-84). Said Articles of Incorporation were filed March 8, 1929, in the office of the Arizona Corporation Commission, Incorporating Department, after exchange of letters between Association's counsel, Arizona Corporation Commission, State Treasurer and Superintendent of Banks. Defendant's Exhibit B in evidence (716-734). These communications definitely show the purpose and intent of the Asso-

ciation to comply with the laws of Arizona so that it could become and transact the business of a building and loan association, and also show the performance of duty by the public officers of Arizona, namely, Arizona Corporation Commission, State Treasurer of the State of Arizona and Superintendent of Banks of the State of Arizona.

Said articles were published as required by law. Affidavit proving such publication was filed in the office of the Arizona Corporation Commission, Incorporating Department, April 19, 1929 (60).

In the Articles of Incorporation, among other things, it is provided:

"That the name of said corporation shall be Security Building and Loan Association" (81).

"That the purposes for which said corporation is formed are to encourage industry, frugality, homebuilding, and savings among its shareholders, members and others; the accumulation of savings; the loaning of its shareholders, members and others of the moneys or funds so accumulated, with the profits and earnings thereon, and the repayment to each all his savings and profits, whenever they have accumulated to full par value of the shares or at any time when he shall desire the same, or when the Corporation shall desire to repay the same, as it may be provided in the By-laws; and generally to do any and all other acts and things authorized by law, and more particularly by and under Chap-

ter 31, 1922, Arizona Session Laws, Chapter 11, 1923, Arizona Session Laws, and Chapter 76, 1925, Arizona Session Laws, and for all other purposes and with all the rights, powers, privileges and immunities in said laws set forth" (81-82) * *.

"That the number of directors of said Corporation shall be not less than five (5), or more than fifteen (15), a majority of whom shall at all times each be the owner and holder of not less than ten (10) shares of the capital stock" (82)* *.

"That the amount of capital stock of this Corporation is Five Million ($5,000,000.00) dollars, and the number of shares into which it is divided is Fifty Thousand (50,000), of the par value of one Hundred ($100) Dollars each, all of which, when issued, shall be set apart as a fixed and permanent guaranteed capital. Additional working capital may be accumulated by the issuance of membership shares, units and certificates, both installment and fully paid as provided for in Chapter 76, 1925 Arizona Session Laws, and the by-laws of this Corporation" (83).

"That the amount of said capital stock which has been actually subscribed is Forty-five Thousand ($45,000) Dollars, and the whole thereof has been subscribed to and fully paid for by the Arizona Holding Corporation, a corporation organized and existing under and by virtue of the laws of the State of Arizona" (83).

By-laws of Association were adopted by the incorporators acting as the board of directors and were filed in the office of the Arizona Corporation Commission on the 8th day of March, 1929 (62). In the by-laws, among other things, it is provided:

Article I, Section 3. "The object and purpose of this corporation shall be to encourage industry, frugality and the accumulation of savings among its shareholders, members and others, and to make loans to its shareholders, members and others for the purpose of aiding them in acquiring and improving real estate" (63).

Article II, Section 2. "The majority of the board of directors shall always be selected from those holding ten or more shares of capital stock, and the minority may be selected from holders of membership shares" (63).

Article II, Section 3. "The capital stock shall participate in the net earnings of the association to the full extent permitted, or which may be permitted, under the provisions of the laws of the State of Arizona and as interpreted by the Arizona Corporation Commission and or the State Superintendent of Banks.

"As provided for in Section 12, Chapter 76, 1925, Arizona Session Laws, this association will set aside from its earnings five per cent (5%), to a reserve fund until such fund shall equal fifty per cent (50%) of the total libaility of the association to its members" (63-64)**.

Article III, Section 1. "The affairs of the corporation shall be managed by a board of not less than five or more than fifteen directors, who shall be elected annually from the shareholders and members, in the manner provided by law, to hold office for one year, and until their successors are duly elected and qualified" (64).

Article IV, headed "Powers and Duties of Directors," subdivisions Fourth and Fifth of Section 1:

"Fourth. To loan the funds of the corporation, or such portion thereof as may be advisable, upon such securities as are provided by law, and to prescribe the terms and conditions upon which loans may be made; provided, that whenever loans are made upon the definite contract plan the body of the note or obligation shall set forth the number of installments, and the amount of each installment required to repay the principal of the loan, together with the interest on the periodical unpaid balances, within the time agreed upon, the exact rate of interest to be specified in each note or obligation.

"Fifth. To borrow money for the purpose of making loans or with which to pay withdrawals or maturities" (65-66).

ArticleV, headed "Duties of Officers," under the subdivision relating to committees and sub-heading "Security Committee," provides:

"Section 1. It shall be the duty of the security committee to ascertain the market value of each and every piece of property offered as security for any proposed loan and to report thereon, in writing, to the Loan Committee.

"Section 2. Every application for a loan shall be approved in writing by at least two members of said committee before the loan shall be made" (69).

Article VIII, headed "Membership Shares," provides:

"Section 1. Membership shares having an ultimate matured or par value of One Hundred ($100) Dollars each may be issued at such time and in such manner as the board of directors may prescribe, or in accordance with the terms and provisions of the charter of this corporation.

"Section 2. Membership shares may be classified as installment or full pay. Each subscriber to the installment shares shall become entitled to said shares when the payments made thereon, together with the profits apportioned thereto, shall amount to the sum of One Hundred ($100) Dollars for each of such shares, at which time the shares shall mature and payments thereon shall cease. Full paid membership shares may also be issued at such times as the board of directors may determine to subscribers paying in the full face value of One Hundred ($100) per share. Dividends at such rate

per annum as may be fixed by the board of directors, not exceeding a full participation in the net profits, shall be paid on these shares.

"Section 3. Holders of either form of membership shares are members of the corporation, with all the rights, powers and privileges incident thereto, including the right to vote at all meetings of the shareholders and members—one vote for each share—and are subject to the same restrictions and liabilities.

"Section 4. An entrance fee of not exceeding Two Dollars ($2) per share may be charged and collected upon all installment membership shares" (71-72).

Article IX, headed "Investment Certificates," provides:

"Section 1. Investment certificates having an ultimate matured or par value of One Hundred ($100) each, may be issued in either of the following forms:

No. 1.

Pass Book Shares:

Can deposit and withdraw at will up to $100.00. Interest paid on minimum monthly balance at 5%. When $100.00 is accumulated can convert to Full Paid Coupon Investment Certificate paying 6%.

No. 2.

Full Paid Investment Coupon Certificates:

Issued in units of $100.00. May be withdrawn after 12 months on 30 days' written notice (at option of Board of Directors). Non-callable for three years. 6% quarterly coupons attached.

No. 3.

Installment Investment Certificates:

Class A:

$6.00 per month for 120 months pays $1000.

Class B:

$3.50 per month for 174 months pays $1000.

Class C:

$13.00 per month for 65 months pays $1000.

Member may withdraw full amount paid in less cancellation fee together with interest at 7% compounded semi-annually up at last dividend paying date by giving 30 days' written notice.

No. 4.

Monthly Income Certificate:

Issued in amounts of $2000 or more paid in full. Monthly income checks will be mailed the first of each month at 6%. Withdrawable after 12 months on 30 days' written notice (at option of Board of Directors). Certificate is non-callable for three years.

No. 5.

Prepaid Certificates:
Class A:

By making a cash payment of $350 person may withdraw $1000 at end of 180 months.
Class B:

By making cash payment of $400 person may withdraw $1000 at end of 160 months.

Class C:

By making cash payment of $500 person may withdraw $1000 at end of 120 months.

On the above class of certificates the money accumulates at 7% interest compounded semi-annually.

"Section 2. An entrance fee of Two Dollars ($2) per certificate may be charged and collected upon the installment investment certificates, and upon prepaid certificates.

"Section 3. Holders of any of the forms of investment certificates above designated are not members of the corporation, and have none of the rights, powers and liabilities incident thereto" (72-74).

Article X, headed "Withdrawal and Maturities," provides:

"Section 1. Holders of installment membership shares, and of installment investment certificates, desiring to withdraw a part or all of the amount

to the credit of their shares or certificates, may do so by giving thirty (30) days' written notice of their intention or desire so to do. On the expiration of such notice, they are entitled to receive the full amount paid in upon their membership shares or investment certificates, exclusive of any entrance fee charged and collected, together with such proportion of the earnings thereon as may have been fixed by the board of directors; provided that not more than one-half of the monthly receipts of any one month shall, without the consent of the board of directors, be applicable to withdrawals for that month. All withdrawals will be paid in succession and in the order in which the notices of intention were filed. Shares or certificates pledged as security for or with a loan can not be withdrawn in money until the loan is fully paid" 74-75).

Article XI, headed "Loans," provides:

"Section 1. Loans may be made on such terms and at such rate of interest as the board of directors may determine provided that whenever loans are made for a definite period on the installment plan, the number of installments, and the amount of each installment required to pay the principal of the loan together with interest at the agreed rate on the periodical balances, within the time specified, must be expressed in the face of the note or obligation taken.

"Section 2. Loans will only be made upon the security of a first mortgage or deed of trust of

real estate, or upon the security or pledge of membership shares, or investment certificates of this association, or upon other bonds and securities which may be approved of by the State Superintendent of Banks.

"Section 3. Loans upon the security of membership shares or investment certificates shall not be made in excess of ninety per cent of the withdrawal value of such shares or certificates.

"Section 4. Loans made for a definite period on the installment plan may be repaid at any time by paying the balance then unpaid on the principal and all arrears of interest, if any. The corporation reserves the right to charge a penalty of two months' interest on the unpaid balance if repaid within one year from date of note, or a penalty of one months' interest on the unpaid balance if repaid after one year from date of the note but in advance of the time set forth in the contract.

"Section 5. Whenever a borrower shall be three months in arrears in the payment of his interest or loan installments, unless otherwise provided in the note, the whole loan shall become due, at the option of the board of directors, and they may proceed to enforce collection upon the securities held by the corporation. The withdrawal value of all shares or certificates pledged as collateral security shall be applied in part payment of the loan and said shares or certificates shall be deemed cancelled and surrendered to the corporation.

"Section 6. All expenses incident to abstracts, examinations of title, execution of papers, attorney's fees, or sale of securities pledged as security for loans or advances, shall be paid by the party offering the security or securing the loan.

"Section 7. Borrowers must furnish, at their own expense, acceptable policies of fire insurance on all improved realty pledged as security for loans granted, with the usual mortgage clause making loss, if any, payable to the corporation, as its interest may appear" (75-77).

Article XII, headed "Fines and Penalties," provides:

"Section 1. Borrowers who neglect or fail to pay their interest or loan installments in accordance with the terms of the note or obligation shall pay interest at not exceeding one per cent per month on the amount of such delinquent indebtedness.

"Section 2. The same rate of interest shall apply to all advances made by the association for insurance premium, street or sewer assessments, balances due for unpaid taxes on property pledged as security for loans, or other like advances" (77).

Article XIII, headed "Miscellaneous," provides:

"Section 1. Each member or investor shall be entitled to a certificate of 'membership shares' or 'investment certificates' showing the number of such

shares or certificates held, and their par, or ultimate value, and each member or investor holding installment membership shares or installment investment certificates shall also be furnished with a pass book, in which to record the periodical payments made by him, and in which the terms and conditions attaching thereto shall be fully set forth. These certificates may be transferred by assignment, in person or by an attorney, but no such assignment shall be valid, except between the parties thereto until duly entered upon the books of the corporation. A transfer fee of fifty cents for each share or certificate transferred will be charged by the corporation.

"Section 2. In the event of loss of any certificates of stock, membership shares or investment certificates, the recorded owner shall be entitled to a duplicate upon making an affidavit setting forth the facts of the loss and the filing of an acceptable bond, with two or more sureties, in an amount equal to the book value of the certificate lost.

"Section 3. The board of directors may provide that partial withdrawals, made 'mid-term,' shall not participate in the earnings on the amount withdrawn, that shall have accumulated since the last apportionment of profits.

"Section 4. The seal of the corporation shall be circular in form, bearing the name of the corporation and the date when incorporated.

"Section 5. As to all features not specifically covered by these by-laws, the provisions of Chapter 76, 1925, Arizona Session Laws, and all laws of the State of Arizona, shall govern the transaction of business by this Corporation" (78-79).

That Association before the completion of its organization applied to the Superintendent of Banks of the State of Arizona for permission to carry on the business of a building and loan association and paid to said Superintendent of Banks the fee fixed by the Superintendent of Banks and prescribed by law, to-wit, fifty dollars, to cover the cost of investigation by the Superintendent of Banks, as prescribed by law. The fact of payment of fifty dollars was stipulated by the parties (715). Upon such payment, the Superintendent of Banks made an investigation as prescribed by law (85).

On the 12th day of March, 1929, Association deposited with Charles R. Price, State Treasurer of the State of Arizona, certificates of deposit issued by the First National Bank, Prescott, Arizona, numbered 14, 15, 16, 17 and 18, each in the sum of $10,000, and four notes and four mortgages in the aggregate sum of $10,000, which said certificates of deposit and said notes and mortgages were at the time they were deposited with said Charles R. Price, State Treasurer, approved by the Superintendent of Banks of the State of Arizona (94). Defendant's Exhibit E in evidence (714).

On the 12th day of March, 1929, a permit or license to do business as a building and loan associa-

tion for the fiscal year ending June 30, 1929, was issued by the Superintendent of Banks of the State of Arizona to Association. The Superintendent of Banks collected from Association five dollars fee prescribed by law for the issuance by him to a building and loan association of a permit or license. A like permit was issued and a like fee of five dollars paid on July 1, 1929, for the fiscal year ending June 30, 1930. A like permit was issued and a like fee of five dollars paid on July 1, 1930, for the fiscal year ending June 30, 1931. A like permit was issued and a like fee of five dollars paid on July 1, 1931, for the fiscal year ending June 30, 1932 (87).

The permit or license was issued upon a printed form provided for the purpose by the Superintendent of Banks of the State of Arizona (88). Defendant's Exhibit D in evidence (713).

Said printed form of permit or license was in the words and figures following, to-wit:

"$5.00 No.....

State of Arizona
State Banking Department

KNOW ALL MEN BY THESE PRESENTS:

That.....has compiled with the provisions of Revised Code 1928, relating to Banking, Building and Loan Associations.

Now, Therefore, I, Jas. B. Button, Superintendent of Banks of the State of Arizona, do hereby grant unto the said..... a License to use the name herein stated and transact the business of.....subject to the laws of Arizona, for the fiscal year ending June 30, A. D., 19....., unless said License be sooner revoked as provided by law.

In Witness Whereof, I have hereunto set my hand at the Capitol, in the City of Phoenix, this .....day of....., 19.....

.....

Superintendent of Banks" (88-89).

The certificates of deposit numbered 14, 15, 16, 17 and 18 and the four notes and mortgages in the aggregate sum of $10,000, were retained in the possession of Charles R. Price, Treasurer of the State of Arizona, until the 8th day of October, 1929. On the 7th day of October, 1929, and before the surrender of said certificates of deposit and said notes and mortgages, a $50,000 bond was executed by Association as principal and National Surety Company, a corporation, as surety, known as Banker's Blanket Bond. Said bond was approved by the Superintendent of Banks of the State of Arizona on October 7, 1929, and was deposited with Charles R. Price on October 8, 1929, in lieu of said certificates of deposit and said notes and mortgages (94). Defendant's Exhibit E in evidence (714).

Said surety bond remained in force and effect and in the possession of Charles R. Price until the 6th day of June, 1930, on which said date said bond was terminated and canceled and returned to Association after on said June 6, 1930, there was deposited with Charles R. Price, State Treasurer of the State of Arizona, by Association, notes and mortgages, assets of the Association, of the total value of $59,518.39, all of which had theretofore been approved by the Superintendent of Banks of the State of Arizona (94-95). Defendant's Exhibit E in evidence (714). Notes and mortgages, property of the Association, approved by the Superintendent of Banks of the State of Arizona, aggregating in excess of $50,000, have been at all times since June 6, 1930, in the possession of the State Treasurer of the State of Arizona (95). Defendant's Exhibit E in evidence (714).

At the time of the filing of the involuntary petition in bankruptcy there was in the hands of the State Treasurer of the State of Arizona notes and mortgages, all of which had been theretofore approved by the Superintendent of Banks of the State of Arizona, the following:

$1,342.12 Shurts, G. W. and Susan E. Note and Mortgage. Dated December 18, 1929.
1,819.21 Lytle, W. R. and Carrie B. Note and Mortgage. Dated December 18, 1929.
2,000.00 Asberry, Seth C. and Mae L. Note and Mortgage. Dated January 25, 1930.
4,200.00 Krotzer, Harry W. and Martha H.

Note and Mortgage. Dated March 20, 1930.
2,850.00 McCreary, Aaron M. and Elsie. Note and Mortgage. Dated March 10, 1930.
4,528.76 Fordham, M. M. Note and Mortgage. Dated March 27, 1930.
5,100.00 York, R. A. Note and Mortgage. Dated March 28, 1930.
7,200.00 Lehmbert, H. B. and Joy. Note and Mortgage. Dated April 10, 1930.
2,569.82 Brean, Ernest A. and Cora B. Note and Mortgage. Dated October 14, 1930.
1,569.89 Nelson, Harry and Anna B. Note and Mortgage. Dated June 4. 1930.
3,500.00 Hunter, Sadie Robson. Note and Mortgage. Dated July 1, 1930.
3,000.00 West, E. J. and Veralda. Note and Mortgage. Dated March 1, 1930.
3,700.00 Wilbar, F. S. and Mildred C. Note and Mortgage. Dated July 15, 1930.
2,500.00 Johnson, Ivan C. and Mary W. Note and Mortgage. Dated September 16, 1930.
1,015.00 Flake, Osmer and Ethel R. (assumed by W. B. Stone). Note and Mortgage. Dated October 14, 1930.
1,819.30 Flake, Osmer D. and Ethel R. Note and Mortgage. Dated October 14, 1930.
5,900.00 Sly, Will and Carrie. Note and Mortgage. Dated June 18, 1931.
1,700.00 Pinney, Chas. J. and Lucile E. Note and Mortgage. Dated April 6, 1931.
1,755.50 Smith, Milton P. and Fannie Field. Note and Mortgage. Dated May 20, 1931.
2,100.00 Smith, Milton P. and Fannie Field. Note and Mortgage. Dated May 20, 1931.
1,850.00 DeBerge, Ray H. and Lorene A.

Note and Mortgage. Dated March 6, 1931.
1,611.26 Flake, Osmer D. and Ethel R.
Note and Mortgage. Dated February 15, 1931.
1,500.00 Borden, William H. and Mary E.
Note and Mortgage. Dated June 20, 1930.
(95-97). Defendant's Exhibit E in evidence (714).

Said certificates of deposit, said notes and mortgages and said bond all were approved by the Superintendent of Banks and deposited with the State Treasurer of Arizona pursuant to the laws of the State of Arizona covering and relating to building and loan associations doing and transacting business in the State of Arizona (97). Defendant's Exhibit E in evidence (714).

The Superintendent of Banks of the State of Arizona at all times since issuing to Association the first permit or license to do and transact the business of a building and loan association treated Association as a building and loan association and received and collected from Association the fees prescribed by law to be paid by building and loan associations and examined Association as a building and loan association commencing at nine-thirty A. M. January 11, 1930 and completed the examination at seven P. M. January 13, 1930. In this examination, the Superintendent of Banks, in his official capacity, examined into the stock structure and every phase of the business of the Association, Petitioner's Exhibit 35 (298-326). The Association continued, following this examination, to trans-

act business. Beginning at eight forty-five A. M. September 1, 1931, the Superintendent of Banks again examined the Association as a Building and Loan Association, the examination being completed at four-thirty P. M. September 3, 1931, Petitioner's Exhibit 36 (327-375). The Superintendent of Banks made calls upon Association, as he did upon other banking institutions and building and loan associations for statements as a building and loan association at the close of business at the times provided by law. Pursuant to such calls, Association filed with the Superintendent of Banks and published seven reports of the condition of its business, to-wit as of the close of business on the following dates: March 27, 1930, June 30, 1930, September 24, 1930, December 31, 1930, March 25, 1931, June 30, 1931 and September 29, 1931, Petitioner's Exhibit 37 (378-470).

The Superintendent of Banks in his official capacity and in the performance of his duties prescribed by the statutes of Arizona, determined that Association was at all times since the commencement of its existence and at the date of the filing of the petition in bankruptcy was a building and loan association (98), Defendant's Exhibit D in evidence (713). Charles R. Price, Treasurer of the State of Arizona, also dealt with and treated Association as a building and loan association, and the acts recited in this statement of facts as having been performed by the State Treasurer were pursuant to law prescribing his duties as State

Treasurer in relation to building and loan associations. He was acting under the advice of the Attorney General of the State of Arizona (734-736). Mit Sims, who succeeded Charles R. Price as State Treasurer, acted in his official capacity with respect to Association (736-737).

On the 16th day of November, 1931, the Superintendent of Banks of the State of Arizona served upon Association a notice signed by him in his official capacity, dated the 14th day of November, 1931, revoking the permit or license issued to Association June 30, 1931, authorizing Association to engage in the business of a building and loan Association. Said notice is in the words and figures following, to-wit:

Great Seal of the State of Arizona

"State Banking Department

State House

Phoenix, Arizona

S. W. Ellery,
Superintendent of Banks,

Leo N. Roach,
Chief Examiner,

A. G. King,
Examiner,

L. V. Bailey,
Examiner,

A. T. Hammons,
Inspector,
Minnie Seaman,
Accountant-Stenographer

November 14, 1931

Dear Mr. Perkins:

Please take note that the license of the Security Building and Loan Association, permitting you to do business in this State, is hereby revoked by this office to take effect immediately.

Yours, very truly,

S. W. Ellery,
Superintendent of Banks.

Mr. Glen O. Perkins, Secretary,
Security Bldg. & Loan Assn.,
Tucson, Arizona,
C.C. Gov. Geo. W. P. Hunt,
K. Berry Peterson,
Attorney General." (90), Defendant's Exhibit F (714-715).

On the 16th day of November, 1931, by the Superior Court of the State of Arizona, in and for Maricopa County, Ben H. Dodt was appointed receiver of Association in an action filed by one Ennis Taber as plaintiff against Association (89).

It is undisputed that Association transacted business from about March 12, 1929, to November 16, 1931.

On September 4, 1929, the appointment of E. T. Cusick as statutory agent was filed in the office of the Arizona Corporation Commission and certificate of incorporation was forwarded by the Arizona Corporation Commission to E. T. Cusick, attorney for the Association. Defendant's Exhibit B in evidence (716), and stipulation (202).

Association issued certificates to those doing business with it in the several forms shown by Petitioner's Exhibits Nos. 10, 11, 12, 13, 14, 15, 16, 17 (212) 18, 19, 20, 21, 22, 23 (221).

There was received by the Association from approximately 2304 persons the aggregate sum of $121,711.83, $28,165.38 thereof through the Tucson office and $93,546.35 thereof through the Phoenix office by the issuance of Pass Book Certificates similar either to Exhibit 15, 16 or 17 (221 and 223). The form of these Pass Book Certificates appears in full (212-220). The form of investment certificates like Exhibits 10, 11, 12, 13 and 14 and reproduced by photostatic copies inserted (212) and likewise the forms of certificates like Exhibits 18, 19, 20, 21, 22 and 23 are reproduced by photostatic copies (221). We shall not set forth in this statement of facts the exact form of these various certificates, but refer the court to the forms in full as they appear in the record at the designated point.

There was received by the Association from approximately 64 persons the aggregate sum of $57,-

078, $12,500 thereof through the Tucson office and $44,578 thereof through the Phoenix office by the issuance of fully paid non-coupon certificates similar to Exhibit 20 (221, 224).

There was received by the Association from approximately 10 persons the aggregate sum of $5500 by the issuance of fully paid coupon certificates similar to Petitioner's Exhibits 14 and 19 (221-222 and 225).

There was received by the Association from approximately 44 persons the aggregate sum of $2996.62 by the issuance of installment investment certificates similar in form to one or the other of Petitioner's Exhibits 10, 11, 12, 13, 18, 21, 22 or 23 (222 and 226-229).

The total received from all of the foregoing it was stipulated did not represent the paid up value of the several certificates but only the cash paid in value (222). Aside from the original purchase of stock, the amounts specified herein as received upon the issuance in various forms of certificates represents the greater portion of all moneys received by the Association. There were other moneys received, some of which was borrowed by the Association but we deem it unnecessary to detail the source of same to an understanding of the case.

Association held intact receipts amounting to $415.01 under order of the Superintendent of Banks for the last two or three days of its business Schedule J of Exhibit 24 (254).

At the time of filing the involuntary petition, notes and mortgages in connection with twenty-three loans were in the custody of the State Treasurer of Arizona, each of which had been approved by the Superintendent of Banks. Defendant's Exhibit E in evidence (95-97) and (714). A list of these twenty-three loans are set out in this statement of facts and the aggregate thereof amounts to the sum of $65,130.86.

A schedule of fifty-nine additional real estate loans is found in defendant's Exhibit A in evidence (265-272). These aggregate $250,427.45. These notes were sold to Century Investment Trust, a corporation, on October 1, 1931 for $250,427.45 evidenced by promissory note payable in installments. Defendant's Exhibit A (265). These notes were after sale, held by Association as collateral and were not to be released until their purchase price was paid. Other loans were made by the Association during its business existence which had been paid.

Association made other real estate loans during its entire business, and with the exception of a few isolated loans, there is no evidence to show that any mentioned real estate loans were not made substantially in compliance with the law relating to a building and loan association.

Much evidence was introduced by Petitioners over objection of the Association and State Receiv-

er Ben H. Dodt, but we do not in our view of the case deem any further inclusion of facts necessary to an understanding of the case. We believe we have stated the material facts.

SPECIFICATION OF ERRORS

I. THE UNITED STATES DISTRICT COURT ERRED IN NOT FINDING THAT ASSOCIATION IS EITHER A BUILDING AND LOAN ASSOCIATION OR A BANKING CORPORATION INCORPORATED UNDER THE LAWS OF THE STATE OF ARIZONA PROVIDING FOR THE INCORPORATION OF BUILDING AND LOAN ASSOCIATIONS AND BANKS AND ALSO ERRED BY FINDING ASSOCIATION TO BE A MONEYED AND BUSINESS CORPORATION INCORPORATED UNDER THE GENERAL CORPORATION LAWS OF THE STATE OF ARIZONA AND NOT TO BE A BANK OR A BUILDING AND LOAN ASSOCIATION.

This specification of errors is presented through Assignments of Errors 1, 2 and 3 which are as follows:

> ASSIGNMENT OF ERROR 1. The United States District Court erred in finding that the Security Building & Loan Association is a moneyed and business corporation, incorporated under the general corporation laws of the State of Arizona, and is not a banking corporation nor a building and loan association. (741)

ASSIGNMENT OF ERROR 2. The United States District Court erred in failing to find that Security Building & Loan Association, a corporation, is not a moneyed and business corporation incorporated under the general corporation laws of the State of Arizona. (741)

ASSIGNMENT OF ERROR 3. The United States District Court erred in failing to find that Security Building & Loan Association, a corporation, is a building and loan association or a bank incorporated under the laws of the State of Arizona relating to the incorporation of building and loan associations and banks. (741)

II. THE UNITED STATES DISTRICT COURT ERRED IN NOT FINDING THAT ALL OR A PORTION OF THE BUSINESS TRANSACTED BY ASSOCIATION WAS THE BUSINESS OF A BANK OR THE BUSINESS OF A BUILDING AND LOAN ASSOCIATION.

This specification of errors is presented through Assignments of Errors 4 and 5, which are as follows:

ASSIGNMENT OF ERROR 4. The United States District Court erred in failing to find that all of the business transacted by the Security Building & Loan Association was the business of a building and loan association or the business of a bank. (741)

ASSIGNMENT OF ERROR 5. The United States District Court erred in failing to find

that at least a portion of the business transacted by Security Building & Loan Association was the business of a bank or the business of a building and loan association. (742)

III. THE UNITED STATES DISTRICT COURT ERRED BY FAILING TO CONCLUDE AS A MATTER OF LAW THAT ASSOCIATION WAS EXEMPTED FROM BEING ADJUDGED A BANKRUPT BY VIRTUE OF THE PROVISIONS OF SECTION 4 OF THE BANKRUPTCY ACT OF JULY 1, 1898 AS AMENDED FEBRUARY 11, 1932 AND THAT THE UNITED STATES DISTRICT COURT WAS WITHOUT JURISDICTION. SAID DISTRICT COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT IT HAD JURISDICTION TO ADJUDGE SAID ASSOCIATION A BANKRUPT AND THAT SAID ASSOCIATION WAS BANKRUPT.

This specification of errors is presented through Assignments of Errors 6, 7, 8 and 9, which are as follows:

ASSIGNMENT OF ERROR 6. The United States District Court erred in concluding, as a matter of law, that said court had jurisdiction to adjudge Security Building & Loan Association, a corporation, bankrupt. (742)

ASSIGNMENT OF ERROR 7. The United States District Court erred in concluding, as a matter of law, that said Security Building & Loan Association is bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy. (742)

ASSIGNMENT OF ERROR 8. The United States District Court erred in failing to conclude, as a matter of law, that the Security Building & Loan Association is not subject to be adjudged bankrupt. (742)

ASSIGNMENT OF ERROR 9. The United States District Court erred in failing to conclude, as a matter of law, that it was without jurisdiction to adjudge the Security Building & Loan Association, bankrupt. (742)

IV. THE DECREE OF THE UNITED STATES DISTRICT COURT (182-192) IS ERRONEOUS IN THAT IT ADJUDGED ASSOCIATION A BANKRUPT AND IN THAT IT DID NOT DISMISS THE INVOLUNTARY PETITIONS. THE UNITED STATES DISTRICT COURT ERRED IN ADJUDGING ASSOCIATION A BANKRUPT AND IN NOT DISMISSING THE INVOLUNTARY PETITIONS.

This specification of errors is presented through Assignments of Errors 10 and 11, which are as follows:

ASSIGNMENT OF ERROR 10. The United States District Court erred in adjudging the Security Building & Loan Association, bankrupt. (742)

ASSIGNMENT OF ERROR 11. The United States District Court erred in not dismissing the involuntary petition in bankruptcy against the Security Building & Loan Association for lack of jurisdiction to adjudge it bankrupt. (742-743)

ARGUMENT

I

Specification of Errors I and III will be considered together.

SPECIFICATION OF ERRORS I. THE UNITED STATES DISTRICT COURT ERRED IN NOT FINDING THAT ASSOCIATION IS EITHER A BUILDING AND LOAN ASSOCIATION OR A BANKING CORPORATION INCORPORATED UNDER THE LAWS OF THE STATE OF ARIZONA PROVIDING FOR THE INCORPORATION OF BUILDING AND LOAN ASSOCIATIONS AND BANKS AND ALSO ERRED BY FINDING ASSOCIATION TO BE A MONEYED AND BUSINESS CORPORATION INCORPORATED UNDER THE GENERAL CORPORATION LAWS OF THE STATE OF ARIZONA AND NOT TO BE A BANK OR A BUILDING AND LOAN ASSOCIATION.

SPECIFICATION OF ERRORS III. THE UNITED STATES DISTRICT COURT ERRED BY FAILING TO CONCLUDE AS A MATTER OF LAW THAT ASSOCIATION WAS EXEMPTED FROM BEING ADJUDGED A BANKRUPT BY VIRTUE OF THE PROVISIONS OF SECTION 4 OF THE BANKRUPTCY ACT OF JULY 1, 1898 AS AMENDED FEBRUARY 11, 1932 AND THAT THE UNITED STATES DISTRICT COURT WAS WITHOUT JURISDICTION. SAID DISTRICT

COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT IT HAD JURISDICTION TO ADJUDGE SAID ASSOCIATION A BANKRUPT AND THAT SAID ASSOCIATION WAS BANKRUPT.

Section 4 of the Bankruptcy Act of July 1, 1898 as amended February 11, 1932, reads as follows:

> "SEC. 4. Why may become bankrupts.—(a) Any person, except a municipal, railroad, insurance, banking corporation, or a building and loan association, shall be entitled to the benefits of this act as a voluntary bankrupt.
>
> "(b) Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business or commercial corporation (except a municipal, railroad, insurance, or banking corporation, or a building and loan association) owing debts to the amount of $1,000 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act.
>
> "The bankruptcy of a corporation or association shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States."

Is the Association either a building and loan association or a bank? If it is either, then the United

States District Court is without jurisdiction to adjudge it a bankrupt. Such is the very language of the Bankruptcy Act as amended. Citation of authority is unnecessary. The District Court recognized the correctness of the foregoing statement.

The first inquiry in determining if the Association is a building and loan association or a bank we submit should be an examination of its articles of incorporation and its by-laws. A reference to the articles and by-laws (62-84) shows clearly that it is not an ordinary corporation. Indeed, in the articles of incorporation (81-82) we find in a statement of the purposes for which the Association is formed the statement: "to do any and all other acts and things authorized by law, and more particularly by and under Chapter 31, 1922, Arizona Session Laws, Chapter 11, 1923, Arizona Session Laws and Chapter 76, 1925, Arizona Session Laws."

The incorporators then put their finger upon the statute under which they purposed to incorporate. The title of Chapter 31, 1922 Arizona Session laws reads as follows:

> "AN ACT To Create a State Banking Department, to Provide for the Appointment of a Superintendent of Banks and Bank Examiners Prescribing the Qualifications of Such Officers and Defining Their Duties; Defining the Various Classes of Banks and Making Rules for their Governance; Limiting of Loans to Individuals, Firms or Corporations; Limiting

> Loans to Officers, Stockholders and Directors; Defining Liability of Stockholders; Defining Method of Liquidation and Reorganization of Insolvent Banks; Providing for the Levying of Assessments on Stockholders; Defining Unauthorized Banking; Providing for the Issuance of Licenses to State Banks; Defining Relations Between State Banks and Federal Reserve Banks and National Banks; Fixing Salaries and Providing for All Expenses and Costs in Carrying This Act Into Effect and Incurred Pursuant to the Provisions Thereof; Repealing Title IV of the Revised Statutes of Aribona, 1913, Civil Code, With All Acts Amendatory Thereof, Paragraphs 2129 and 2130 of Chapter 3, Title IX, Revised Statutes of Arizona, 1913, Civil Code, and All Other Acts or Parts of Acts in Conflict With the Provisions of This Act, and Declaring an Emergency."

The title of Chapter 11, 1923 Arizona Session Laws reads:

> "An Act to Amend Section 3 of Chapter 31, Session Laws of Arizona, 1922, Special Session, Providing for the Office of Superintendent of Banks; Fixing the Term of Office; Defining the Qualifications of This Officer; Prescribing the Official Bond; and Fixing the Salary; and Repealing all Acts and Parts of Acts in Conflict Herewith."

Referring to Chapter 76 of the 1925 Arizona Session Laws appearing in full in the appendix to this brief, we find it relates to the organization of building and loan associations. The court's attention is directed to the following appearing in Section 1

of said Chapter 76 of the 1925 Arizona Session Laws:

> "The words 'building and loan association' shall form a part of the name and *no corporation not organized under this act shall be entitled to use a name embodying either said combination of words.*"

The name adopted in the articles is "Security Building And Loan Association." (81) Necessarily therefore, this name would challenge the public authorities, but we do not need to rely alone upon the name. That it was intended that Association should be incorporated as a building and loan association is clearly apparent from defendant's Exhibit B in evidence (716-734). A part of this exhibit consists of letters one dated February 7, 1929, written to the Arizona Corporation Commission by E. T. Cusick, who was acting for incorporators of Association. In this letter Cusick stated:

> "Inclosed herewith you will please find a carbon copy of my letter to the State Banking Department explaining the status of the relation existing between the Arizona Holding Corporation and the proposed Arizona Security Building and Loan Association. * * * Due to the difference between an ordinary corporation and a building and loan association, I have made no mention of the 'highest amount of indebtedness' which the building and loan association can incur, nor have I mentioned that private property shall be exempt from the building and loan association debts, for we intend to make the capital stock of the building

and loan association a form of guaranteed capital stock.

"When you have the approval of the State Superintendent of Banks to the proposed and submitted by-laws and charter, I trust you will proceed with the usual issuance of Charter." (731-732.)

The carbon copy of letter referred to is addressed to James B. Button, State Banking Department, Phoenix, Arizona and is entitled "Re Arizona Security Building and Loan Association." It reads in part:

"I am forwarding herewith, in duplicate, copies of by-laws and a copy of the articles of incorporation of the above designated and proposed building and loan association. * * * As a proposed director and attorney for the building and loan association and attorney for the Arizona Holding Corporation, I respectfully request that your department investigate this matter, and trust that your department will notify the Arizona Corporation Commission of your approval of the issuance of a charter for said building and loan association." (732-734.)

On February 23, the Secretary of the Arizona Corporation Commission wrote Attorney Cusick in part as follows:

"We are in receipt of your wire of even date and are pleased to advise that the name 'Security Building and Loan Association' is available for corporate use.

"We are returning the articles, however, for

> the reason that the Commission wishes Article V revised to show that all the directors are stockholders instead of a majority." (727.)

February 26, Attorney Cusick replied to the letter last quoted from, saying in part:

> "I am returning herewith the articles of incorporation of the above designated association, with the corrections suggested in your letter of the 23rd. It has been the intention of the incorporators that the directors much be stockholders, and the by-laws so provide. The Superintendent of Banks advised me that he was ready to give a clearance on this matter at any time you requested and I trust that you will give this matter your immediate attention, as $50,000 lying idle is a rather severe loss." (729.)

In answer to this communication, under date of February 27, the Secretary of the Arizona Corporation Commission wrote Attorney Cusick in part as follows:

> "Please be advised that we have again requested the Honorable James B. Button, Superintendent of Banks, for a clearance in the matter of the Security Building and Loan Association, and he advises that he wishes to hold this in abeyance for a few more days.
>
> "The articles are now all right for filing and we are holding same together with your check pending the receipt of the clearance from the banking department." (728.)

On March 6, 1929, the Secretary of the Arizona

Corporation Commission wrote Button, State Superintendent of Banks in part as follows:

> "We are holding for filing the articles of incorporation of the Security Building and Loan Association, subject to clearance from your department.
>
> "If convenient, may we ask you to give us your decision today?" (726.)

Two days later, March 8, Button, Superintendent of Banks wrote in reply:

> "This is to advise you that the Security Building and Loan Association, Tucson, Arizona, has complied with Chapter 76, Session Laws 1925, regarding the organization of building and loan associations.
>
> "You therefore have the permission of this department to issue a certificate of incorporation to the above association." (724.)

We again assert and the evidence comprised in Defendant's Exhibit B in evidence, from which the foregoing quotations have been taken, that it is undisputedly true that the incorporators of the Association intended to organize a building and loan association, and that the State Officials charged with duties and responsibilities incident to such organization, thoroughly so understood and performed their duties approving such organization.

Let us now see if the incorporation of Association complied with the provisions of Chapter 76 of the 1925 Arizona Session Laws. Article I desig-

nates the name of the Association. This complies with the law. In Article II, the purposes of the corporation are stated. The purposes are building and loan purposes, and the express statutory provisions relating to the organization of building and loan associations are referred to in this Article as are the acts relating to banks. Articles III and IV clearly state requirements and meet the provision of the statute as does also Article V. In Article VI is found provisions for the amount and kinds of stock that the Association will issue. In fact all requirements of the Act are complied with in the form and substance of the Articles.

The Association, it is true, failed to appoint a Statutory Agent until September 4, 1929, (202) and its formal certificate of incorporation was not delivered until that date, (716) but what of it? The agent was appointed and the certificate issued on September 4, 1929, more than two years before the Act of Bankruptcy and before the filing of petition in bankruptcy. We are not here concerned with the status of the Association except in a very general way before September 4, 1929. The only real interest is the status of the Association at the time of the Act of Bankruptcy and the filing of the involuntary petition. In Arizona it has been repeatedly held that there is no penalty or remedy for the failure to appoint a statutory agent except a suit for the dissolution of the company may be commenced by one of the parties named in the statute. Rillito Canal Co. vs. Schmidt, 11 Ariz.

49 (89 Pac. 523); Flowing Wells Co. vs. Culin, 11 Ariz. 425 (95 Pac. 111). If a suit for dissolution had been commenced and a statutory agent appointed before trial, the action would be dismissed. Big Four Advertising Co. vs. Clingan, 15 Ariz. 34 (135 Pac. 713). There is not to our knowledge any other irregularity in the organization of Association as a building and loan association. The by-laws, (62-80) we submit, fully comply with the law and for convenience of the court we have quoted from them at some length in our Statement of Facts. Assume the by-laws to be in some respects contrary to the law. It is settled that the statutes of Arizona are a part of the Articles and by-laws, and the statutory provisions would supersede any provision of the by-laws in conflict therewith. Foster vs. Bauman, 34 Ariz. 274 (271 Pac. 30)

At the time of organization Association deposited with the State Treasurer certificates of deposit on a solvent bank and certain notes and mortgages. For a period of time it had on file with the State Treasurer a surety bond as prescribed by the laws of Arizona relating to building and loan associations. The bond was approved by the Superintendent of Banks. Following the bond at all times notes and mortgages were in the possession of the State Treasurer and at all times such notes and mortgages were approved by the Superintendent of Banks. (714 and 94)

Association transacted a business, held itself out

as a building and loan association; it was examined as such at least twice by the Superintendent of Banks, (298-375) phase after phase of its business was examined into. It made reports to the Superintendent of Banks, seven in all, as a building and loan association. (378-470) The Superintendent of Banks issued one permit or license after another to Association as a building and loan association. (87-88)

In view of all of the foregoing, none of which can be disputed, we earnestly urge upon this court that the determination of the proper state officials as to the character of Association is conclusive upon this court. This principle is suggested in the Arizona case of Deatsch vs. Fairfield, 27 Ariz. 387 (233 Pac. 887) at pages 404-407. The Corporation Commission was not permitted to accept and file Articles of Incorporation other than of a building and loan association having such a name. Before it did so, it obtained the approval of the Superintendent of Banks after an investigation.

The communication of the Superintendent of Banks (724) shows that he decided, in his quasi judicial capacity, that Association had complied with the Arizona law relating to building and loan associations. He likewise, upon each successive issue of permit or license, so decided and his acts of examination of Association, as a building and loan association, were a like decision, as was also each of the several calls made by him upon it for

a report under the Arizona law relating to the duties of a building and loan association.

This phase of the question should not be passed without emphasizing that the original intervening petitioning creditors first swore in their involuntary petition that Association was a building and loan association (14). At that time possibly a building and loan association was subject to be adjudged a bankrupt. Following the amendment of the Bankruptcy Act to exclude building and loan associations on February 11, 1932, then for the first time counsel and their clients took the position that Association was an ordinary corporation incorporated under the general corporation laws of Arizona (49). Of course, this was necessary to their purposes to have Association adjudged a bankrupt.

In the recent case of Clemons vs. Liberty Savings and Real Estate Corporation, decided November 1, 1932, by the Circuit Court of Appeals for the Fifth Circuit, reported at 61 F. (2d) page 448, after discussing that ultra vires banking acts or building and loan acts could not determine the status of a corporation so as to exempt it from the Bankruptcy Act, the Court used this language:

> "It is evident that appellee was *organized* to do a general savings and loan business, something less than either a bank or a building and loan association. If it occasionally engaged in banking transactions, those acts were ultra vires and could not operate to make it a bank within the meaning of the bankruptcy law; nor

was it a building and loan association. *The status of a corporation is fixed by its charter.*"

When the District Court found as a fact that Association was organized under the general corporation laws of Arizona, and was not a building and loan association or a banking corporation, in our view of the situation, it wholly misconceived both the facts and the law in the case. It is for redress from such misconception of the law and facts that an appeal is prosecuted to this court.

We confidently urge, therefore, that the District Court erred as specified in Specification of Errors I and III.

II.

SPECIFICATION OF ERRORS II. THE UNITED STATES DISTRICT COURT ERRED IN NOT FINDING THAT ALL OR A PORTION OF THE BUSINESS TRANSACTED BY ASSOCIATION WAS THE BUSINESS OF A BANK OR THE BUSINESS OF A BUILDING AND LOAN ASSOCIATION.

The burden of proof rests upon intervening petitioning creditors. By every authority, a person petitioning to have a corporation adjudged a bankrupt has the burden of proof, not only that the corporation is a "moneyed, business or commercial corporation," but also that it is not in *any of the classes exempted by the bankruptcy act.* In re

Beisecker & Martin, 277 Fed. 1010; First National Bank of Bode vs. Williams (C. C. A.) 31 F. (2d) 749; Smith vs. Brownsville State Bank (C. C. A.) 15 F. (2d) 792; In re Macklem, 22 F. (2d) 426. Furthermore, the provision of the bankruptcy act enumerating the classes of corporations subject to the act *is to be strictly construed and includes only such corporations as are clearly within the enumeration.* In re New York & New Jersey Ice Lines, 147 Fed. 214.

We shall not undertake to detail the voluminous evidence covering the acts of this corporation. We will content ourselves with the major business transacted. We are of the earnest and sincere opinion that every act and transaction of Association was that of a building and loan business except possibly in this respect, and that is some loans made to non members, or perhaps some loans made upon inadequate security. Such loans to non members or on inadequate security, if of any consequence whatever, amount only to breach of duty and do not in any manner divest the Association of its building and loan character. Bankers may steal the money of the bank or misappropriate the money of the bank, but these acts where they are proven, do not divest the institution of its character as a bank.

It should be at all times remembered that the burden is not upon Association to show that it was doing a building and loan business, *but the burden*

is upon the intervening petitioning creditors to show that it was not doing a building and loan business or a banking business. Under any view of the evidence, in this they have wholly failed because some transactions of Association were undisputedly and unquestionably building and loan acts. Many of these we have already detailed in our Statement of Facts such as the articles of incorporation of the association, its declared purposes, the procuring of a permit from the Superintendent of Banks to operate as a building and loan association *and the several renewals of same;* the deposit of securities with the State Treasurer *and the substitution of the $50,000 surety bond for such securities.* These acts by statute and otherwise can only be acts of a building and loan association. To be added to these is the act of subjecting itself to the investigation and examination of the Superintendent of Banks. This could only be had as a bank or a building and loan association. It might well be said that the Corporation Commission, the State Treasurer and the Superintendent of Banks and their several employees, if Association was not a building and loan association or a bank, were embezzlers of the people's time devoted to subjecting this Association to the laws of the State of Arizona governing building and loan associations and exacting from it the fees the law provides for a building and loan association or a bank to pay.

The moneys that it obtained on pass book certificates and the other certificates were certainly

either a building and loan transaction or a banking transaction. No ordinary corporation in Arizona is permitted to so operate. They are peculiarly functions and privileges of a building and loan association or a bank. The record will be searched in vain for evidence showing the many loans made by the Association were not at least substantially all loans of a building and loan character and made substantially in accordance with the laws of the State of Arizona governing loans by building and loan associations. And again, if not building and loan transactions, the many loans were banking transactions. Who is it under the laws of the State of Arizona or generally speaking under the laws of any of the states that may receive deposits of money other than a banking corporation or a building and loan association. Certainly no ordinary corporation in Arizona is permitted to receive deposits. We shall hereafter refer to the recognized right of a building and loan association to receive deposits. Chapter 40, 1931 Arizona Session Laws.

It makes no difference whether all of the acts of the Association were building and loan or banking acts or not. It makes no difference if even the principal business is neither building and loan association nor banking business. If the Association transacted any building and loan business or any banking business under its articles of incorporation, it is excepted from the operation of the Bankruptcy Act. It is probably also true that since the Asso-

ciation was incorporated as a building and loan association, it would be unimportant if it never in fact transacted any building and loan business since the amendment to Section 4 of the Bankruptcy Act of July 1, 1898 on June 25, 1910. 36 Stat. 838, 839. Gamble vs. Daniel decided by the Eighth Circuit Court of Appeals March 14, 1930, 39 F. (2d) 447. In all earnestness, however, we contend that if Association performed any building and loan association business or any banking business, it is excepted from the operation of the Bankruptcy Act. In support of this contention, we first desire to call attention to the various changes in the Bankruptcy Law.

The part of the Bankruptcy Act referring to involuntary bankruptcy was originally enacted as follows:

> "Any natural person, except a wage-earner of a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and corporation *engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits,* owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under the State or Territorial laws, may be adjudged involuntary bankrupts."

and remained in that form until amended by act of June 25, 1910.

In 1910, it was amended to read as follows:

> "Any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and *any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation,* owing debts to the amount of $1,000 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this title."

On February 11, 1932, the act was further amended by adding the words, "or a building and loan association" after the words "banking corporation" in the exceptions.

In reading the authorities, attention should be paid to the wording of the act at the time the decision was rendered. Keeping in mind well known rules of statutory construction, particularly the rule that legislative interpretation of a statute is always persuasive to a court, and the further rule that if a legislative body, in amending an act, omits or adds words, the same is presumed to have a purpose, we do not believe it takes any review of authorities to determine that Congress, in amending the statute, intended to except building and loan *associations*, no matter what other business they may transact, and no matter of the legality of its acts.

The District Court apparently adopted the view

to the effect that the bankruptcy court will be guided by the *principal business* conducted by the corporation. There are authorities to be cited so holding. They will be found, however, to have arisen under the law as originally enacted.

It is to be noted that in the original law Congress provided for involuntary bankruptcy of corporations *engaged principally* in manufacturing, etc. *pursuits*, and did not have the exceptions as now contained in the statute. The original act did not make the nature and character of the corporation the determinative factor, but the business or pursuit in which the corporation was engaged.

In 1910, in amending the act, Congress pointedly omitted the words "engaged principally," and very pointedly omitted the word "pursuits." The 1910 amendment, insofar as corporations are concerned, provides that *any moneyed*, etc. corporation —not a corporation principally engaged in some pursuit—is subject to the act, and excepts "a municipal, railroad, insurance, or banking corporation" (not a corporation *engaged principally* in banking, etc.); and yet as to natural persons the 1910 amendment retains the words "except . . a person *engaged chiefly* in farming."

In the case of Gamble vs. Daniels, supra, page 450, the court in speaking of the purpose and effect of this 1910 amendment, said:

"It was to escape the confusion and uncer-

> tainty that the amendment 'adopted the scientific way of declaring a class and then stating exceptions to the class.' Cong. Rec. Vol. 45, page 2275. We have no doubt that when Congress used the words 'banking corporation' it meant corporations which were authorized by the *laws of their creation* to do a banking business."

The 1932 amendment added a building and loan *association*—not a corporation *engaged principally* in building and loan business — to the excepted corporations. It is apparent from every known rule of construction that Congress, in amending this law, intended to have no quibbling as to the business which a corporation may engage in, or *principally* engage in, and if it was organized and qualified as a bank, or organized and qualified as a building and loan *association, such it is,* no matter if it actually engages in other pursuits.

For such reason we contend that we should not be put to a discussion as to what business this association was principally engaged in. It was organized as a building and loan association, qualified as such, was granted a permit by the Superintendent of Banks to operate as a building and loan association, and at least insofar as the officers' intentions were concerned, did operate as a building and loan association and subject itself to annoying and expensive investigations and examinations by the Superintendent of Banks, which undobutedly they would not have done if they did not believe they were a building and loan association. In other

words, we have a corporation recognized by all state officials—the Corporation Commission, Superintendent of Banks, State Treasurer—as a building and loan association, and doing a building and loan business, and subject to all regulations of the state of Arizona concerning building and loan associations, and the officers and managers of the corporation themselves believing and thinking they were conducting a building and loan business, yet the intervening petitioning creditors, because of some business carried on by the Association, which they say was not building and loan, desire the Court to weigh the evidence and determine the *principal* business of the Association. We assert, under the Bankruptcy Act as amended, such is not the province of the Court.

We are not without authority to support our position but on the contrary we assert that the only case directly in point in principal or fact is the case of In re Humphrey Advertising Company (C. C. A. 7th C.) 177 Fed. 187. This case has not been criticized or overruled and we believe this exact situation has not, since the Humphrey case, been before any appellate court for consideration. No decision is cited as late as April, 1933, in Shepard's Federal Citations thereon.

The Arizona laws are similar to those of Illinois where the case under discussion arose in that corporations can engage in more than one business. We quote from the opinion at page 188:

"Consequently, it happens that a corporation may carry on two distinct and independent lines of business, one of which may prosper, while the other languishes; or, both having become insolvent, one may be within the provisions of the bankruptcy act, and the other without the act . . . . .

It cannot be that, as between two separate lines of business, one within, and the other without, the act, and both included in the charter, it is the duty of the bankruptcy court to *weigh, measure, estimate, balance, and compare the one with the other with a view to ascertaining the relative importance of the several classes of business* embraced within the specifically declared objects of the corporation and actually carried on by it, in the absence of clear statutory authority — bearing in mind the strictness with which this section of the act should be construed. In re Empire Metallic Bedstead Company, 98 Fed. 981, 39 C. C. A. 372 . . . . . .

Assuming, as insisted by appellant, that the other branch of appellee's corporate objects does come within the act, there existed two distinct classes of business in which appellee was engaged, neither of which can be termed its principal business, and both of which stood on the same footing for the purpose of ascertaining what was the principal business of appellee. If the court should assume to decide that one or the other is the business in which the corporation is principally engaged, it could not find that the rejected line of business is incidental thereto, for it is not. The case is novel, and one of first impression, growing out of the language of the Illinois statute. We are of the

> opinion that the facts of the case create a situation not within the bankruptcy act, for the reasons stated."

Upon this authority is this court not bound to declare Association with the excepted corporations?

However, even if the Court undertakes to weigh the importance of the alleged various businesses conducted by this Association, we earnestly contend the final result of a careful examination of the testimony must be the conclusion that not only its principal, but all of its business, was that of a building and loan association. The definition in the statute of the state of Arizona of building and loan associations is, "organizations having for their object accumulation by the members of their money by periodical payments into the treasury thereof, to be invested, from time to time, in loans to the members upon real estate for home purposes."

This Association did accumulate money by periodical payments into the treasury, and did invest it, from time to time, in loans upon real estate. Counsel for intervening petitioning creditors in the District Court said that the greater proportion of the alleged bankrupt's money was accumulated from the sale of certificates which bore interest, and some of which were fully paid at the time of the sale, and others were payable in installments or, in the words of the statute, "periodical payments into the treasury" were made thereon; and also by the receipt of deposit from various persons from

time to time for which so-called passbook certificates were issued. Counsel stated that there is no authority in the statute governing building and loan associations for the accumulation of money in that manner. We believe that counsel also must admit that there is no prohibition against accumulation of money in such manner. The statute does not say that you shall not issue and sell investment certificates, and does not say you shall not receive deposits and issue passbook certificates therefor. It does not define the word "accumulation," nor the method of accumulation; it does not define the word "members," nor who are members; and it does not define "periodical payments." Counsel for creditors insisted in the District Court that a building and loan association has to be in the nature of a *mutual* company or association. We believe they must come to that conclusion from a study of the original history of building and loan associations. Originally, building and loan associations were mutual, but also, so were insurance companies and many other forms of associations which are now recognized as legitimate stock companies. You cannot gather from Chapter 76 of the 1925 Arizona Session Laws or the 1928 Code that building and loan associations must be mutual, because Section 613 of the 1928 Code provides that the articles of incorporation shall name *the amount of par value* and *the kinds of stock* that the association will issue. That certainly contemplates regular stock companies and possibly a combination of several different kinds of capital stock. At any

rate, the legislature of the state of Arizona has definitely settled the matter with an amendment of Section 621 of the 1928 Code, referring to withdrawal of a shareholder of a building and loan association, such amendment being Chapter 40 of the 1931 Session Laws of Arizona. In fact this amendment answers practically every contention made by the creditors in the District Court and that can be made in this court. When a legislature, in amending a law, interprets or construes such law, such an interpretation and construction is persuasive to and binding upon a court, unless such subsequent interpretation is violative of the plain wording of the original law. II Lewis Sutherland Statutory Construction, page 886; First National Bank v. Missouri, 263 U. S. 640.

Keeping in mind that the article in the 1928 Code concerning building and loan associations does not prescribe that a corporation must be mutual, or define exactly in what manner or method moneys shall be accumulated or what evidences of payments by subscribers shall be issued, or define the word "members" except by implying that "shareholders" are members, and in turn apparently providing for any number of classes of shareholders (in fact, the 1928 Code, as to the matters above mentioned, is ambiguous and indefinite), we read the 1931 amendment above referred to. It commences, "Any shareholder whose stock is not delinquent and has not been declared forfeited. . . . " may withdraw such stock on certain terms and con-

ditions and receive certain payments therefor. The last part of the amendment reads as follows:

> "It is expressly provided, however, that where the building and loan association *is not strictly a mutual company but is in effect and actually a stock company the certificate holders, or subscribers to certificates, or depositors, irrespective of designation,* whose payments are not delinquent and have not been declared forfeited, shall have the right at any time after the date of initial payment of withdrawing all sums paid by them excepting two and one-half per cent of maturity value of the *certificate.* After one year from the date of initial payment such *depositors* shall be entitled to withdraw the full amount by them *deposited,* excepting two and and one-half per cent of the maturity value of the certificate, plus interest for the full time at the rate specified in the contract; provided however, that interest shall be paid up to the last annual or semi-annual interest paying date. It is also further provided that thirty days notice of intent to withdraw shall be given by the *depositor* or *certificate holder* to the company. Not more, however, than one-half of the monthly installments received by such association for any month shall be used during that month to pay withdrawals, without the consent of the board of directors."

Therefore, the legislature of the state of Arizona which enacted the 1928 Code, and also the 1931 amendment, in said amendment construes and interprets the 1928 act as permitting and allowing building and loan associations to: (1) to be stock

companies and not mutual; (2) to issue certificates and have certificate holders; (3) to receive deposits. And furthermore, the legislature apparently recognizes that certificate holders and depositors are "shareholders" because the amendment is entitled "WITHDRAWAL OF SHAREHOLDER" and provides that where a building and loan association is a "stock company" not mutual, "certificate holders, or subscribers to certificates, or depositors, *irrespective of designation*, whose payments are not delinquent . . . . . " may withdraw the same under terms and conditions comparable with those provided for shareholders in a mutual company. The statute clearly contemplates mutual and stock companies, but for mutual companies the members are evidently designated "shareholders," and in stock companies the members may be "certificate holders," "subscribers to certificates," or "depositors." Thus we find every possible contention in this case completely answered by statute; first, a building and loan association is properly organized as a stock company; second, a building and loan association can accumulate moneys by means of investment certificates or by receiving deposits; third, certificate holders and depositors are *members* of a building and loan association, no matter whether designated so by law or not.

Therefore, this Association, in having "certificate holders" and "depositors" strictly and technically complied with the statute in accumulating moneys.

In the court below, about the only other acts complained of by intervening petitioning creditors as being non building and loan acts are loans made by the Association. It was contended in the court below that loans by the Association were not made to members as provided by statute. The evidence discloses that many loans were made to members, that is certificate holders and depositors, also the evidence discloses that some loans were made to non members.

In the first place, loans are only a part of the business of a building and loan association. The 1925 Session Laws, Chapter 76 and the 1928 Code do contemplate that upon a loan being made by a building and loan association, the borrowers should subscribe for certificates or other forms of membership to the amount of the loan, and such subscribed membership shall be held as additional security. Suppose such is not done—what is the effect? Is the loan invalid? Certainly not. The borrower could not set up a failure to subscribe to membership as a defense to a note or foreclosure of a mortgage. The remedy for such a failure, if anyone has been damaged thereby, is either to compel the borrower to subscribe to the required membership, or possibly a suit against some officer. The fact that loans were made without compelling a subscription certainly will not deprive a corporation of its character as a building and loan association. For illustration, the statutes of the state of Arizona provide that a savings bank shall loan its

money only on first mortgages upon real property, or invest in bonds of the state, county, etc. Suppose any savings bank loaned fifty per cent of its deposits upon *second* mortgages, and with the other fifty per cent purchased Corporation stock, all in violation of the statute. May it be said that such acts deprived it of its character as a bank? Certainly not. Our banking laws provide that banks shall not loan to any officer or director an amount in excess of the equivalent of ten per cent of its capital stock and surplus, and further provide that a loan to any one individual, other than an officer or director, shall not at any time exceed the equivalent of fifteen per cent of its capital stock and surplus. Suppose that a bank violates each and all of these provisions, which we well know has been done, yet it is not deprived of its character as a bank. It is still doing a banking business. The remedy is against the defaulting officers.

Suppose some loans made by the Association were excessive. This has nothing to do with the character of the Association. It is not determinative of whether it is a building and loan association. The statute provides that appraisals should be made by *three members of the Association* and such appraisement by such members will determine the amount to be loaned. No evidence whatever appears in the record that there was not an appraisement made by three members of the association in connection with each loan. Assume that three members acted fraud-

ulently in making appraisals. Such fraudulent act might create a liability on those making the loans. It would have no determinative effect as to the character and status of the Association.

We trust the foregoing will persuade the court that the business transacted by Association was all building and loan business, but if not all building and loan business, that the principal business or some business was building and loan business. However, if Association is not a building and loan association, it must be a bank.

It is our view that Association is a building and loan association. However, its articles of incorporation contain all that would be necessary to constitute it a savings bank under the laws of Arizona. In its articles it refers, as before noted, to Chapter 31 Arizona Session Laws 1922. It is our idea that reference was made to this chapter by reason of Sections 9 and 10 thereof, which we quote as follows:

> "Section 9. Institutions Subject to Examinations. All banks organized under the laws of this State, all loan and trust companies receiving deposits, and all building and loan associations organized and doing business within this State, shall be subject to examination by the Superintendent of Banks or Examiner.
>
> Section 10. Duties of Superintendent of Banks and Examiner. The Superintendent of Banks, or the Examiner, shall visit and examine every savings bank at least once in each year, and every bank other than savings banks,

> and every building and loan association, at least twice in each year. At every such examination careful inquiry shall be made as to the condition and resources of the institution, the mode of conducting and managing its affairs, the official action of its directors, the investments and disposition of its funds; whether or not it is violating any of the provisions of law relating to banking corporations and banks, and as to such other matter as the Superintendent of Banks may prescribe."

It may be, however, that the organizers of Association, in addition to having in mind a building and loan association, also had in mind a savings bank, and this may be the reason for the reference contained in the articles. That such may be the case is strengthened by the reference to Chapter 11 of the 1923 Arizona Session Laws which is an amendment of Section 3 of Chapter 31 of the 1922 Arizona Session Laws only relating to the appointment of a Superintendent of Banks. It would take a herculean effort to hurdle over the fact that Association is a building and loan association, and in so doing one must land in a banking corporation.

If it can be said that the Association, in accepting deposits and in issuing investment certificates or certificates of indebtedness, was not doing a building and loan business, then it must have been doing a banking business. There is no corporation authorized to receive such deposits and to issue such certificates except a building and loan association or a banking corporation.

Section 1, 16 and 17 of Chapter 31 of the 1922 Arizona Session Laws read:

"Section 1. Construction. All the general powers and privileges, as well as the general restrictions and limitations provided in this Chapter, and applied to the corporations to be organized under and regulated by this Chapter, by the general designation of banks, shall be understood and construed to include commercial banks, savings banks, those combining both branches of business and trust companies.

Section 16. Commercial Bank Defined. The term commercial bank, when used in this Chapter, means any bank authorized by law to receive deposits of money, deal in commercial paper, or to make loans thereon, and to lend money on real or personal property, and to discount bills, notes, or other commercial paper, and to buy and sell securities, gold and silver bullion or foreign currency or bills of exchange.

Section 17. Savings Bank Defined. The term savings bank, when used in this Chapter, means a bank organized for the purpose of accumulating and loaning its funds; receiving deposits of money; loaning, investing, and collecting the same with interest and repaying depositors with or without interest and having power to invest said funds in such property, securities, and obligations, as may be prescribed by its board of directors, and to pay a stipulated rate of interest on deposits made for a stated period or upon special bonds."

These three sections are now found as Section 209 of the Revised Code of Arizona 1928.

From the definitions contained in the foregoing quoted sections of the Session Laws of 1922, it is to be readily seen that the articles of incorporation of the Association bring it within the terms of said statute. In other words, Association could carry on a banking business without such business being ultra vires, whereas any business other than that of a building and loan association or a banking business would, in all probability, be beyond the charter authority of the Association and ultra vires.

A like question was raised in the case of Rossi v. Hammons, 34 Ariz. 95, 268 Pac. 181. The Arizona Building and Loan Association sold $5000.00 of its fixed and permanent capital stock to Rossi, and later some officers of the corporation without any authority of the board of directors, and in direct violation of a provision of the by-laws, repurchased such stock. Upon the association becoming insolvent, a receiver was appointed by said court, and such receiver brought suit for the recovery of the $5000.00; and the defendant demurred upon the ground that the receiver was not a proper party, but that under the statute the Superintendent of Banks was the only person entitled to liquidate a building and loan association. The demurrer was sustained, and thereafter the Superintendent of Banks took over the liquidation of the association and brought suit. The defendant again demurred, but this time on the

ground that under the statute, while the Superintendent of Banks had the power of investigation and examination of building and loan associations, he had no authority to liquidate them. The demurrer was overruled, and in the Supreme Court the appellee, Superintendent of Banks, took two positions: one, that the building and loan association under the purposes stated in its charter, could, in fact, carry on a savings bank business and therefore was subject to liquidation as a savings bank under the banking code; secondly, that the appellant by demurring to the action brought by the receiver appointed by the court who was, in fact, a proper party, invited the error of the action being brought by the Superintendent of Banks. On the second point the court sustained the judgment of the lower court, but held the first point not well taken. The court said:

> "Appellee takes the position that, due to certain clauses in its articles of incorporation, the Arizona Building & Loan Association was permitted to carry on the business of a savings bank and for this reason should have been held to be one, but it is unnecessary to determine whether this is true or not for the reason that if it had this right under its charter this fact alone would not be sufficient to make it a savings bank when the primary purpose of its organization was to carry on the business of a building and loan association. Before such a result could follow it would be necessary to show that it actually transacted business of this character *or held itself out as doing so.* And while it is true that a building and loan asso-

> ciation, *which actually holds 'itself out to the public as receiving money on deposit, whether evidenced by certificate, promissory note, or otherwise,'* (Section 54 Banking Code), *even in the absence of charter permission to transact such business, may be considered as carrying it on anyway and, therefore, as subject to the liquidation as well as other provisions of the Banking Act,* yet in view of the fact that the record in this case is free from even suggesting that this association either did a business of this kind or held itself out as doing it, this section of the banking act is wholly without application and furnishes no basis for holding the association to be a savings bank."

If the rule prior to the 1910 amendment of the Bankruptcy Act that it is the business actually done, not what a corporation's charter permits, which determines the question of whether or not it is exempt from the operation of the Bankruptcy Act, should be applied, and if the acceptance of deposits and the sale of certificates be not the transacting of a building and loan business, then those transactions were banking transactions and Association must be held to be principally engaged in the banking business, a business not ultra vires under its charter. Whether it be a building and loan association or a banking corporation it is exempted from the operation of the Bankruptcy Act and the involuntary petitions should have been dismissed. The proof offered by petitioners falls far short of sustaining the burden of proof cast upon them.

III.

SPECIFICATION OF ERRORS IV. THE DECREE OF THE UNITED STATES DISTRICT COURT (182-192) IS ERRONEOUS IN THAT IT ADJUDGED ASSOCIATION A BANKRUPT AND IN THAT IT DID NOT DISMISS THE INVOLUNTARY PETITIONS. THE UNITED STATES DISTRICT COURT ERRED IN ADJUDGING ASSOCIATION A BANKRUPT AND IN NOT DISMISSING THE INVOLUNTARY PETITIONS.

What we have said in our argument under all other specifications demonstrates the errors complained of in this specification. We shall not repeat the argument.

We urge, in addition to the arguments heretofore presented, under all other specifications, that the United States District Court erred in not dismissing the involuntary petitions, because, when motions to dismiss the original creditors' amended involuntary petition and intervening creditors' involuntary petition filed January 21, 1932, were heard, both said petitions showed upon their face that Association was a building and loan association and, therefore, that the District Court was without jurisdiction to adjudge Association bankrupt.

Norris vs. Crocker, 14 L. Ed., 210, 13 Howard 429;

The Merchants Insurance Co. vs. Ritchie, 18 L. Ed. 540, 72 U. S. 541.

The District Court properly could only have dismissed said petitions or determined that the court had jurisdiction. What the court did, as shown by the order under date of February 13, 1932 (37-40), was to permit original and intervening creditors to file an amended petition within ten days from that date, which would give the District Court jurisdiction or as the court said: "Show the jurisdiction of this court" (39).

The District Court did not have jurisdiction conferred upon it by the amendment of the original intervening creditors' petition which said original petition showed the court not to have jurisdiction. Other later interventions and the filing of involuntary petitions could add nothing to the jurisdiction of the court, which was invoked by the earlier petitions. We have then the situation of the District Court having proceeded without any jurisdiction attempting to authorize an amendment of an involuntary petition to confer jurisdiction. All the court had power to do was to dismiss the then pending involuntary petitions. Petitioners or other creditors might have thereafter filed a new involuntary petition. This was not done. They could not intervene in a proceeding in which the court was without jurisdiction and by allegations in amended petitions or original intervening petitions confer a jurisdiction which did not exist at the time motions to dismiss were seasonably made and heard.

CONCLUSIONS

Summarized our contentions are:

1. That Association was a building and loan association and was conducting a building and loan association business throughout its existence.

2. That even if Association did not transact its business strictly according to statute governing building and loan associations, yet it was organized as such, recognized as such, was issued certificates and permits as such, was required to and did submit to all statutes and regulations governing building and loan associations and never pretended to operate as anything except a building and loan association, and, therefore, under the Bankruptcy Act, as amended in 1910, and in 1932, it was excepted from the corporations subject to be adjudged bankrupt.

3. That Association did unquestionably transact some building and loan business and since it transacted some building and loan business, it is excepted from the corporations that may be adjudged bankrupt and *it is not the province or right of the court to weigh the importance of that business as against other businesses which the Association may have been transacting.*

4. That according to the provisions of the Arizona statutes concerning building and loan associations and the interpretation and construction placed thereon by the Legislature by its amendment in 1931 (Chapter 40, 1931, Arizona Session Laws)

all or at least the principal transactions and business of Association were technically and distinctly building and loan business.

5. That the 1931 amendment of the Arizona Statute must be given full force and effect and if it may be said that such amendment is not a legislative interpretation and construction of the statutory provisions theretofore existing, then we urge that it was a new building and loan law effective of the date of its passage and approval. Several months before the alleged act of bankruptcy in November, 1931. Even if it could be successfully argued that Association was not doing a strict and technical building and loan business before the effective date of said 1931 amendment, we urge *that it was thereafter and at the time of the alleged act of bankruptcy and the filing of involuntary petitions in bankruptcy.*

6. That if intervening petitioning creditors have sustained the burden of establishing that Association is not a building and loan association, *it is our then contention that such creditors have established that the Association is a banking corporation.*

7. That the United States District Court had no jurisdiction to allow intervening creditors to amend their petition, which in its original form showed the court to have no jurisdiction. That all the District Court had power to do was to dismiss the petition. That subsequent interventions and the filing of

amended and new involuntary petitions in the same cause did not confer jurisdiction upon the court. That creditors could have filed a new petition in a new proceeding, but not having done so, the pending involuntary petitions should be dismissed.

We, therefore, respectfully submit that the decree of the United States District Court should be reversed and the involuntary petitions dismissed.

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APPENDIX

AN ACT

TO PROVIDE FOR THE ORGANIZATION OF BUILDING AND LOAN ASSOCIATIONS; REGULATING AND DEFINING THE DUTIES AND OBLIGATIONS OF THE MEMBERS, DIRECTORS AND OFFICERS OF SAID ASSOCIATIONS; PRESCRIBING THE POWER OF THE SUPERINTENDENT OF BANKS OVER SAID ASSOCIATIONS; PROHIBITING THE DOING OF BUSINESS BY ANY COMPANY NOT QUALIFYING UNDER THIS ACT AND PRESCRIBING A PENALTY FOR THE VIOLATION THEREOF; AND REPEALING ALL ACTS AND PARTS OF ACTS IN CONFLICT WITH THE PROVISIONS OF THIS ACT.

Be It Enacted by the Legislature of the State of Arizona:

Section 1. This act shall be known as the building and loan subdivision of the Banking Code. Building and Loan Associations are defined hereby to be corporations, societies, organizations or associations having for their object the accumulation by the members of their money by periodical payments into the treasury thereof, to be invested, from time to time in loans to the members upon real estate for home purposes.

Section 2. Whenever any number of persons, not less than five, shall desire to incorporate a building and loan association, they shall make and file articles of incorporation with the Corporation Commission as provided for the organization of private corporations, which shall include the following:

1. The name of the association. The name shall not be the same as, nor too closely resemble, that in use by any existing corporation established under the laws of this state. The words "building and loan association" shall form a part of the name and no corporation not organized under this act shall be entitled to use a name embodying either said combination of words; provided, that associations now existing may continue their present names;

2. The principal office, or place of business of the association which shall be within this state;

3. The amount of the par value and the kinds of stock that the association will issue;

4. The time of its duration;

5. A provision that such association is organized under this act for the purposes herein expressed;

6. The names and residences of the persons who shall make, subscribe, and acknowledge the said declaration, a majority of whom shall be citizens of this state, and who shall thereafter be called incorporators.

Section 3. Before the completion of the organization of said company, application must be made to the Superintendent of Banks for permission to carry on the business of a building and loan association. Such application must state the necessity for such an association

and full information respecting the proposed organization. The Superintendent of Banks may require a public hearing or may investigate with his Bank Examiners the application and if satisfied that the incorporators are financially responsible and that there is need in the community for the organization of a building and loan association, shall issue a permit to organize such a company and to carry on such business. The association making such application shall pay to the Superintendent of Banks fifty dollars or so much in excess thereof as may be necessary to cover the costs of his investigation which sum shall not be returned in the event the application is denied. No appeal may be had from the decision of the Superintendent of Banks with respect to said application.

Section 4. The conduct and management of the affairs and business of such association shall be vested in a board of directors which shall consist of not less than five nor more than fifteen members. The corporators of the association shall serve as directors until the first meeting of the stockholders, to be held at the time provided for by this act, or until their successors are elected and qualified, after which the members shall be entitled to cast one vote for each director to be elected for each share in good standing in his or her name, cumulative voting shall be allowed. The directors unless it be otherwise provided by the bylaws of the association, shall elect or appoint all the other officers of the association not more than four of the officers of any such association incorporated under the laws of this

state shall be members of the board of directors of such association.

Section 5. The officers of the association shall record the certificate of permission to carry on business, in the office of the County Recorder of the County where the principal office is situated. The incorporators acting in the capacity of directors shall adopt appropriate by-laws to govern and prescribe the methods and the officers by whom the business of the association shall be conducted. The by-laws shall be in conformity with the provisions of this act and the laws of this state, and at all times during the regular hours of business shall be open to the inspection of the members at its principal place of business. The by-laws, among other things, shall especially provide for the character and methods of conducting the business of the association, with rules governing the admission of members, the classes of and sale of its shares, the amount of admission fee, the amount of and the periods when dues shall be paid by the members to the association, the disposition and investment of the funds of the association, including loans, the amount of premiums to be paid for and the rate of interest on loans; the charges of management; providing for the annual meeting of the shareholders of the association, for the election of directors and the appointment of the subordinate officers; for the adoption, ratification, and amendment of the by-laws; for the method of voting at such annual meeting, and for the periodical investigation of the business and condition of such association. Such by-laws shall be recorded in the office of the Coun-

ty Recorder of the County where the principal office of the association is situated.

Section 6. At least thirty days prior to any annual or special meeting of any such association, a notice stating the time and place of such meeting shall be deposited in the post-office at the headquarters of such association directed to each member at his address, as the same appears at the time on the books of the association, and when so deposited, postage prepaid, shall be deemed a legal and sufficient notice of any such meeting, provided, also, that notice shall be given by weekly publication in a daily newspaper having a general circulation in the county where the principal offices of the association are located, or in a weekly newspaper if there be no daily newspaper published in said county, for a period of not less than two weeks and there shall be attached to and accompany such notice any proposed amendment or amendments to the articles of incorporation or by-laws of such association, and a statement of any officer to be elected at such meeting. All members of such association shall be entitled to vote at such meetings in person or by proxy.

Section 7. The association shall only loan its money secured by a note and first mortgage on improved real estate or upon real estate to be improved under contract with the association, and said loan shall not exceed 60 per cent of the conservative market value of the improved real property. No mortgage loan shall be made except upon the report in writing of three appraisers who shall be members of such association, which report shall state the con-

servative value of the property to be mortgaged. Every borrower shall, at the time of procuring a loan, subscribe for an equal amount of stock in the association and the same together with the accumulation shall be held as further security for said loan. The directors in their discretion may also loan upon the security of the shares in the association to the amount of ninety per cent of their withdrawal value; and may loan upon or invest, an amount not greater than twenty per cent of the total assets of the association, in bonds of the United States and of the State of Arizona, counties, school districts and other municipalities, as well as local improvement districts, in said state.

Section 8. Any premium which has heretofore or which shall hereafter be taken for loans or fines imposed for the non-payment of dues, made by any association governed by this act, shall not be considered or treated as interest, nor render such association amenable to the laws relating to usury.

Section 9. The amount or sum which may be set apart as an expense fund, together with the amount which may be charged for membership fees, fines or penalties, shall be fixed by the state superintendent of banks. No such association, corporation or company shall assess as operating expense, either directly or indirectly, in excess of ten cents per month upon each share of its stock of a maturity valuation of one hundred dollars, or assess any fines for non-payment of monthly installments in excess of five cents per $100.00 share for the first month that the same shall be in arrear.

and five cents per month for each month thereafter, and no membership fee in excess of three dollars per $100.00 share shall be charged. The term "operating expenses" shall be deemed to include salaries, commissions, fees or other compensation to its directors, officers, attorneys, auditors, agents, clerks and all other employees, rent, advertising and the like, but shall not include taxes, assessments, repairs, insurance, admission or membership fees, commissions on sale of real estate or the placing of loans, interest paid or liable to be paid, proper legal charges for searching titles, or the preparation of legal papers, expenses of foreclosure suits, or other modified litigation, fees or charges imposed by statute for state license.

Section 10. Any shareholder whose stock is not delinquent and has not been declared forfeited in such association, and whose share or shares are not pledged upon a loan, may withdraw such share or shares from the association at any time after two years by giving at least sixty days' notice in writing to the secretary of his intention to do so; at the end of said sixty days the association shall pay to the members so withdrawing as follows: If said stock is not more than two years old, all amounts paid in by such members upon such stock, except the sums paid as membership fees and fines, and the amount of such payments set apart by said association as an expense fund, which expense fund, however, shall not exceed the amount fixed in this act. If said stock is more than two years old, the member upon such withdrawal shall receive, in addition to the amount above specified, at least

three-fourths of all profits standing to the credit of such shares; provided, that not more than one-half of the monthly installments received by such association for any month shall be used to pay withdrawals without consent of the board of directors.

Section 11. Any such association may purchase at any sale, public or private, any real estate upon which it may have a mortgage, judgment, lien, or other encumbrance, or in which it may have any interest, and may lease, sell, convey or mortgage the same at pleasure.

Section 12. Every association shall set aside from its earnings five per cent, to a reserve fund until such fund shall equal fifty per cent of the total liability of the association to its members.

Section 13. It shall be the duty of the Superintendent of Banks annually, commencing on the first day of September of each year, to examine every building and loan association doing business in this state to ascertain whether such associations have complied with the provisions of this act. For the purpose of such examination the Superintendent of Banks is hereby given the same rights, powers and privileges granted to the superintendent of banks in his examinations of state banks. Said Superintendent shall collect for each such examination the actual and necessary expense incident thereto.

Section 14. It shall be lawful for any minor above the age of eighteen to take and hold shares in such association; and for such association to pay to any minor any money which

may be due him, and his receipt therefor shall be valid, but no minor shall be eligible to hold office in said association.

Section 15. The treasurer and secretary, before entering upon their duties, shall give good and sufficient bonds for the faithful performance of the same and for the safe keeping of all money or property coming into their hands, and the same shall be approved by the board of directors. All such bonds shall be increased, or additional securities required by the board of directors, when the same become necessary to protect the interests of the association or its members, but no director shall be accepted as a surety on such bonds, and the directors shall be individually liable for loss to the association or members caused by their failure to comply with the provisions of this Section.

Section 16. No foreign corporation or any corporation organized under the laws of any other state, shall be admitted or allowed to transact the business of a building and loan association within this state or maintain an office in the state for the purpose of transacting such business. Provided nothing herein shall affect any contract heretofore made between any citizen of this State and any company organized under the law of any other state, which may be prohibited by this act from doing or continuing to do business in this state; and further provided that all funds so collected from such contract shall be invested in first mortgage loans on real estate situate in the State of Arizona or in bonds as provided

by this act and that such company may issue in connection with loans made as aforesaid, an amount of stock in such association as equal to the amount of the loan made.

Section 17. Any person, as agent or otherwise, who shall solicit investments or issue or deliver any certificate of stock in this state for or on account of any foreign building and loan corporation, company or association, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding two hundred dollars nor less than fifty dollars, or by imprisonment in a county jail not exceeding three months. No company shall use the name of Building and Loan Company unless complying with the provisions of this Act. Any person who may act as the agent for any company using the name of any such company shall be guilty of a misdemeanor, punishable as provided in this section.

Section 18. Before the Superintendent of Banks shall issue a permit to do business to any building and loan association, he shall rerequire that such association shall deposit with the State Treasurer of Arizona, territorial funding bonds, bonds of the State of Arizona, or interest-bearing valid bonds of any of the counties, cities, towns, municipalities, or school districts of the State, or interest-bearing promissory notes, secured by first mortgages upon improved real estate within the State of Arizona, to the total amount and sum of fifty thousand dollars, to be held in trust, for the benefit of the stockholders of said building and loan association; provided, that in lieu of de-

posit of the securities, above mentioned, or any of them which such association may be required to deposit with the State Treasurer, a bond may be deposited to the said amount of fifty thousand dollars, by any reliable surety company, authorized and qualified to do business within the State.

Each and every security or bond, authorized to be deposited with the State Treasurer under the provisions hereof, shall be first examined and approved by the Superintendent of Banks before acceptance of the same by the State Treasurer. At the time that such securities or bonds are deposited with the State Treasurer, the same must be accompanied by a declaration, executed by the officers of such building and loan association, under resolution of its board of directors, that such bond and securities shall be and remain in the hands of the State Treasurer, as security for the protection of the stockholders of such association; and all obligations or debts of said association, other than obligations to its stockholders, shall be subordinate and secondary to the rights of such stockholders, as against such securities and bonds, so deposited with the Treasurer. The State Treasurer must, upon receipt of such securities, forthwith deposit the same in the State Treasury in a package marked with the name of the association from whom received, together with the approval or approvals thereof of the Superintendent of Banks, where said securities must remain, as security for the stockholders of such association, to which they respectively belong; but so long as the association remains solvent, the State

Treasurer must permit such association to collect the interest or dividends on any and all interest bearing bonds or securities, so deposited, and such association may, from time to time, under supervision of the Superintendent of Banks, and with his approval withdraw any of said securities, upon depositing the value thereof, in money, or other bonds or securities of the same kind and value as those mentioned in this section, instead of those withdrawn. If any mortgage, or other security, shall be diminished by partial payments thereon, or upon the notes secured thereby, whereby the total amount of the securities, or mortgages, or bonds deposited as such security, shall at their then present worth fall below the aggregate sum of fifty thousand dollars, such deficit must be immediately supplied by the deposit of other bonds or securities in lieu thereof; provided, that any company which may, or may have, suffered its bonds or securities, deposited with the State Treasurer, to diminish by partial or entire payments without reporting such partial payments or diminutions to the Superintendent of Banks, or without immediately supplying other securities to make up the diminution caused, as aforesaid, then such corporation, or its successors, assigns, or trustees, shall be precluded from bringing or maintaining any action in any court of this State for the foreclosure of any such mortgages, or securities, or from bringing or maintaining any action for the possession of any such real estate in this state, as such association may have a mortgage or lien upon and shall be so precluded until such association shall have fully complied with the requirements of this section. The Superintendent of Banks shall keep and maintain in

his office a list of all such bonds or securities, of every building and loan association, which shall be open to the inspection of any stockholder of any such association, and the said Superintendent of Banks shall, at all times, keep up to date, with said list, a record of any withdrawals or changes relating thereto; and it shall be the duty of the Superintendent of Banks, at any time, when in his judgment the bonds or securities of any building and loan association shall become insufficient, for any cause, to maintain said security of fifty thousand dollars with the State Treasurer, to require such association to deposit additional securities to make up the full amount of said fifty thousand dollars. And in the event that such association shall, for any reason, fail to comply with such order of the Superintendent of Banks, within five days from the date of receipt of notice of such order, then the Superintendent of Banks may, in his discretion, revoke the permit and right of said association to do business within the State. All withdrawals of securities, and substitutions therefor, from the custody of the State Treasurer, as authorized in this section, shall be under, and in accordance with, the regulations prescribed by the Superintendent of Banks, not inconsistent herewith.

Section 19. All acts and parts of acts in conflict herewith are hereby repealed.

XVI

Chapter 14, Article 4, sections 612-628 inclusive, Revised Code of Arizona, 1928

Building and loan associations.

612. *Association defined.* Building and loan associations are organizations having for their object accumulation by the members of their money by periodical payments into the treasury thereof, to be invested, from time to time, in loans to the members upon real estate for home purposes.

613. *Incorporation; articles.* Any number of persons, not less than five, a majority of whom shall be citizens of this state, may incorporate a building and loan association. They shall make and file articles of incorporation as provided for the organization of private corporations, which shall include:

1. The name of the association, which shall not too closely resemble that in use by any existing corporation of this state; the words "building and loan association" shall form a part of the name, and no person, not organized hereunder, shall use a name embodying said combination of words, except associations now existing; 2. the principal office, or place of business of the association, which shall be within this state; 3. the amount of the par value and the kinds of stock that the association will issue; 4. the time of its duration; 5. a statement that such association is organized under this article for the purposes herein expressed; 6. the names and residences of the incorporators.

614. *Permit from superintendent of banks; application; hearing.* Before the completion

of the organization, application must be made to the superintendent of banks for permission to carry on the business of a building and loan association. The superintendent may require a public hearing or may investigate the application and if satisfied that the incorporators are financially responsible and that there is need in the community for the organization of a building and loan association, shall issue such a permit which shall be recorded in the office of the recorder of the county of its principal place of business. The association shall pay to the superintendent fifty dollars, or so much in excess thereof as will cover the costs of his investigation. The decision of the superintendent is conclusive.

615. *Directors to conduct business; election of.* The conduct of the business of such association shall be vested in a board of directors of not less than five nor more than fifteen members. The incorporators shall serve as directors until the first meeting of the members. The members shall be entitled to cast one vote for each share in good standing, for each director to be elected, and cumulative voting shall be allowed. Not more than four of the officers shall be members of the board of directors.

616. *By-laws.* The first board of directors shall adopt by-laws to prescribe the methods, and by what officers, the business of the association shall be conducted. The by-laws shall especially prescribe the methods of conducting the business; the rules governing the admission of members, the classes and sale of its shares, the amount of admission fee, the amount of and the periods when dues shall be paid by the mem-

bers; the investment of the funds of the association; the making of loans and the amount of premiums to be paid for and the rate of interest thereon; the charges of management; providing for the annual meeting of the shareholders and the method of voting; for the election of directors and the appointment of the subordinate officers; for the amendment of the by-laws; and for the periodical investigation of the business and condition of such association. Such by-laws shall be recorded in the recorder's office of the county where the principal office of the association is situated.

617. *Meeting of shareholders; notice.* At lease thirty days prior to any annual or special meeting, a notice stating the time and place of such meeting shall be deposited, postage prepaid, in the post office directed to each member at his address as the same appears on the books of the association; like notice shall also be given by publication in a daily newspaper having a general circulation in the county where the principal office of the association is located, once in each week for not less than two weeks. Such mailing and publishing is legal notice of such meeting. There shall be attached to and accompany such notice any proposed amendment or amendments to the articles of incorporation or the by-laws, and a statement of the officer to be elected at such meeting. Members may vote in person or by proxy.

618. *Investment of funds; loans; security.* The association may make loans only upon notes secured by first mortgage on improved real property, or real property to be improved under contract with the association. Such loans

shall not exceed sixty per cent of the conservative market value of the improved real property. No loan shall be made except upon the report in writing of three appraisers, who shall be members of such association, and who shall report the conservative value of the property to be mortgaged. Every borrower shall, at the time of procuring a loan, subscribe for an amount of stock in the association equal to the loan, and the same, together with the accumulation, shall be held as further security for said loan. The association may also loan upon the security of the shares in the association to the amount of ninety per cent of their withdrawal value; and may loan upon or invest, an amount not greater than twenty per cent of the total assets of the association, in bonds of the United States, the state of Arizona, counties, school districts and other municipalities, and of improvement districts, in said state.

619. *Premiums and fines.* Any premium taken for loans, or fines imposed for the nonpayment of dues, by any association organized hereunder shall not be considered as interest and are excepted from the laws relating to usury.

620. *Expense fund; limitation on fines and charges.* The amount which may be set apart as an expense fund, and the amount which may be charged for membership fees, fines or penalties, shall be fixed by the superintendent of banks. No association shall assess or charge as operating expense, directly or indirectly, in excess of ten cents per month upon each share of its stock of a maturity valuation of one hun-

dred dollars, or assess any fines for non-payment of monthly installments in excess of five cents per one hundred dollar share for each month that the same shall be in arrears, and no membership fee in excess of three dollars per one hundred dollars. "Operating expenses" include salaries or other compensation to its directors, officers and all other employees, rent. advertising and all incidental expenses, but shall not include taxes, assessments, repairs, insurance, commissions on sale of real property or the placing of loans, interest, legal charges for searching titles or the preparation of legal papers, expenses of foreclosures, or fees or charges imposed by statute.

621. *Withdrawal of shareholder.* Any shareholder whose stock is not delinquent and has not been declared forefeited, nor pledged upon a loan, may withdraw such stock from the association at any time after two years by giving at least sixty days' notice in writing to the secretary of his intention to do so; at the end of said sixty days the association shall pay to the member so withdrawing as follows: If said stock is not more than two years old, all amounts paid in upon such stock, except the membership fees and fines, and the amount of such payments set apart as an expense fund; if more than two years old, the member upon such withdrawal shall receive, in addition, at least three-fourths of all profits standing to the credit of such shares. Not more, however, than one-half of the monthly instalments received by such association for any month shall be used to pay withdrawals without consent of the board of directors.

622. *Purchase of property mortgaged.* The association may purchase at any sale, public or private, real property upon which it may have a mortgage, or other lien, or in which it may have any interest, and may lease, sell, convey or mortgage the same.

623. *Reserve fund.* Every association shall set aside from its earnings five per cent for a reserve fund, until such fund shall equal fifty per cent of the total liability of the association to its members.

624. *Minor may hold shares.* Any minor above the age of eighteen years may take and hold shares in such association; and the association may pay him any money due him, and his receipt therefor shall be valid. No minor shall be eligible to hold office in such associations.

625. *Bond of secretary and treasurer.* The treasurer and secretary before entering upon their duties, shall give good and sufficient bond for the faithful performance of the same and for the safe keeping of all property coming into their hands, which bonds shall be approved by the board of directors. Such bonds shall be increased, or additional securities required by the board, when it becomes necessary to protect the interests of the association or its members. No director shall be accepted as a surety on such bonds. The directors shall be individually liable for loss to the association or members caused by their failure to comply with this section.

626. *Foreign associations excluded.* No foreign corporation shall be admitted or allowed

to transact the business of a building and loan association within this state or maintain an office in the state; nothing herein, however, shall effect any contract heretofore made between any resident of this state and any foreign corporation, but all funds collected from such contracts shall be invested as required herein of domestic associations, and such foreign corporations may issue in connection with loans made under its contract an amount of its stock equal to the loan.

627. *Soliciting for foreign association prohibited; penalty.* Any person who shall solicit investments or issue or deliver any certificate of stock in this state for or on account of any foreign building and loan association, shall be guilty of a misdemeanor. No person shall use the name of building and loan company unless complying with the provisions of this article. Any such person using a name embodying any combination of the words "building and loan association," or acting as agent for such person, shall be guilty of a misdemeanor.

628. *Deposit of bonds with state treasurer.* Before the superintendent shall issue a permit to do business to any building and loan association, such association shall deposit with the the state treasurer securities of the character authorized for the investment of the funds of the association to the amount of fifty thousand dollars, to be held in trust, for the benefit of the stockholders or members of said association; or in lieu of the deposit of such securities, or part thereof, a bond in the amount of fifty thousand dollars, of a surety company qualified

to do business within the state, to be examined and approved by the superintendent of banks before acceptance by the state treasurer, and shall be and remain with the state treasurer as security to and for the benefit of the stockholders and members of such association. The association may, while solvent, collect the interest or dividends on the securities, and may, with the approval of the superintendent substitute other like security or give bond therefor. The superintendent shall keep in his office a list of all such bonds or securities and of substitutions and changes, which shall be open to the inspection of any member of such association. The superintendent, when in his judgment the bonds or securities of any association have become insufficient to maintain said security of fifty thousand dollars, shall order such association to deposit additional securities, and if such association shall fail to comply with such order of the superintendent, within five days from the date of the receipt of such order, then the superintendent shall revoke the permit and right of said association to do business within the state.

Chapter 40, 1931 Session Laws of Arizona

AN ACT

TO AMEND SEC. 621, REVISED CODE, 1928, RELATING TO BUILDING AND LOAN ASSOCIATIONS AND WITHDRAWAL OF CERTICIFATE HOLDERS AND DEPOSITORS.

Be It Enacted by the Legislature of the State of Arizona:

Section 1. Sec. 621, Revised Code, 1928, is hereby amended to read as follows:

Sec. 621. WITHDRAWAL OF SHAREHOLDER. Any shareholder whose stock is not delinquent and has not been declared forfeited, nor pledged upon a loan, may withdraw such stock from the association at any time after one year by giving at least thirty days notice in writing to the secretary of his intention to do so; at the end of said thirty days the association shall pay to the member so withdrawing as follows: If said stock is not more than one year old, all amounts paid in upon such stock. except membership fees; if more than one year old, the member upon such withdrawal shall receive, in addition, at least three-fourths of all profits standing to the credit of such shares. Not more, however, than one-half of the monthly installments received by such association for any month shall be used to pay withdrawals without the consent of the board of directors. It is expressly provided, however, that where the building and loan association is not strictly a mutual company but is in effect and actually a stock company the certificate holders, or sub-

scribers to certificates, or depositors, irrespective of designation, whose payments are not delinquent and have not been declared forfeited, shall have the right at any time after the date of initial payment of withdrawing all sums paid by them excepting two and one-half per cent of maturity value of the certificate. After one year from the date of initial payment such depositors shall be entitled to withdraw the full amount by them deposited, excepting two and one-half per cent of the maturity value of the certificate, plus interest for the full time at the rate specified in the contract; provided, however, that interest shall be paid up to the last annual or semi-annual interest paying date. It is also further provided that thirty days notice of intent to withdraw shall be given by the depositor or certificate holder to the company. Not more, however, than one-half of the monthly installments received by such association for any month shall be used during that month to pay withdrawals, without the consent of the board of directors.

Section 2. All laws or parts of laws in conflict with the provisions of this act are hereby repealed.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of Security Building & Loan Association, a corporation, Alleged Bankrupt.
SECURITY BUILDING & LOAN ASSOCIATION, a corporation, Appellant,
vs.
JOHN H. SPURLOCK, et al., Appellees.
No. 7099.

MOTION OF APPELLEES, MARY ROSE, RAY L. ROSE, JOE RAMOS, LILLIAN M. ERWIN, LUTHER M. FRINK, E. DALE FRINK, JOHN H. DIGGES, BILLIE LIEBER, HATTIE M. LIEBER, HATTIE SCHNEIDER LIEBER, HENRY F. LIEBER, HENRY LIEBER, JR., HERMAN LIEBER, AND R. E. L. SHEPHERD, RECEIVER IN BANKRUPTCY, TO DISMISS OR AFFIRM

and

BRIEF AND ARGUMENT ON SAME

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA.

ALICE M. BIRDSALL,
THOMAS W. NEALON,
Counsel for Moving Appellees.

TOPICAL INDEX

CASES CITED

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Come now Mary Rose, Ray L. Rose, Joe Ramos, Lillian M. Erwin, Luther M. Frink, E. Dale Frink, John H. Digges, Billie Lieber, Hattie M. Lieber, Hat-Schneider Lieber, Henry F. Lieber, Henry Lieber, Jr., Herman Lieber, Intervening Petitioning Creditors. Appellees herein, by Alice M. Birdsall, their counsel, and R. E. L. Shepherd, as Receiver in Bankruptcy of Security Building and Loan Association, Bankrupt, Appellee, by Thomas W. Nealon, his counsel, and move this court to dismiss, with costs, the appeal taken herein to this court by Security Building and Loan Association, a corporation, and by Ben H. Dodt, State Court Receiver, upon the following grounds:

I.

That this court is without jurisdiction to hear and determine the appeal herein attempted to be prosecuted by Security Building and Loan Association, a corporation, and Ben H. Dodt, State Court Receiver, appellants herein, for the reason that no authority exists, or can exist in said appellants, or either of them, to prosecute this appeal, and that this is so for the following reasons:

That said Security Building and Loan Association, a corporation, did on November 16, 1931, and long prior to the filing of the involuntary petition in bankruptcy herein, in a suit against it filed in the Superior Court of Maricopa County, State of Arizona, on November 16, 1931, being Cause Numbered 35883 in said court, file in said suit its appearance and made no defense to said action, in which action plaintiff asked the appointment of a receiver with authority to liquidate the affairs of said corporation, and that

a receiver was by said Superior Court of Maricopa County, Arizona, appointed on said 16th day of November, 1931, who took over all the business and affairs of said corporation for the purpose of liquidating the same, and that by said action of said Security Building and Loan Association, a corporation, in failing to defend said action, and by the appointment and qualification of a receiver in said proceedings, said corporation and its officers were divested of power and authority to take action contesting the adjudication in bankruptcy in proceedings in the District Court of the United States, for the District of Arizona, wherein the act of bankruptcy alleged and admitted was the appointment of such receiver, and the insolvency of said Security Building and Loan Association was also admitted; that from the time of the appointment of said receiver in said Superior Court of Maricopa County, Arizona, the officers of said corporation were without power or authority to take any action respecting the property or affairs of said corporation and especially any action which would entail the expenditure of funds of said corporation in litigation contesting the action of creditors of said corporation in involuntary bankruptcy proceedings against said corporation based on the acts of said corporation in suffering or permitting a receiver to be appointed in said suit in the Superior Court of Maricopa County, Arizona: and that the officers and agents of said Security Building and Loan Association, a corporation, who are attempting to prosecute said appeal herein were and are without authority to bind said corporation, or to take any action herein on its behalf; that said acts of said officers in so doing are ultra vires and void; and that

no appeal on behalf of said Security Building and Loan Association can be prosecuted by said asserted officers of said corporation herein.

That said Ben H. Dodt, State Court Receiver, is not a proper party appellant herein, and has no right or authority to prosecute an appeal herein on behalf of said Security Building and Loan Association, a corporation, for the reason that he has not been instructed and authorized by the Superior Court of Maricopa County, Arizona, the court under which he holds his appointment and which has jurisdiction of his actions, to take any action in said bankruptcy proceedings, or to prosecute an appeal herein on behalf of said Security Building and Loan Association, a corporation, and that said Ben H. Dodt, State Court Receiver as aforesaid, is without right or authority to prosecute this appeal, said Superior Court of Maricopa County, Arizona, not having authorized him so to do.

II.

That this court is without jurisdiction to hear and determine the appeal herein attempted to be prosecuted by Security Building and Loan Association, a corporation, and Ben H. Dodt, State Court Receiver, appellants herein, for the reason that all the necessary and indispensable parties to the appeal attempted to be prosecuted are not before this court, and that this is so for the following reason:

That as appears from the record herein, a decree adjudicating Security Building and Loan Association, a corporation, bankrupt, was made and entered by

the District Court of the United States for the District of Arizona on the 29th day of September, 1932, (Transcript, pages 182-192) and that an order of reference to R. W. Smith, Referee in Bankruptcy, was made on said date, said order requiring said bankrupt to appear before said Referee in said proceedings on October 14, 1932. (Transcript, page 191)

That on October 20, 1932, an order was made by the Honorable F. C. Jacobs, Judge of the United States District Court for the District of Arizona, allowing an appeal from said Decree and ordering that a cost bond on appeal in the sum of Five Hundred Dollars be provided by appellants (Transcript, page 744), and that such cost bond on appeal was filed in said court on October 24, 1932 (Transcript, pages 745-749), but that no supersedeas bond was filed by said appellants, and that therefore the administration of the estate of said Security Building and Loan Association, a corporation, in the bankruptcy court in accordance with said order of reference and the provisions of the Bankruptcy Act has not been stayed. That a trustee has been appointed in said bankruptcy proceedings and that from the time of his appointment said trustee in bankruptcy of the estate of Security Building and Loan Association, a corporation, has been and is the only representative of all the creditors of said bankrupt and that as such representative of all the creditors of said bankrupt he is a necessary and indispensable party to this appeal; that petitioning and intervening petitioning creditors do not and cannot represent other creditors of said Security Building and Loan Association, a corporation, in this appeal, and that an adjudication in bankruptcy hav-

ing been made, and no stay of said proceedings having been taken, *all* creditors of said bankrupt have an interest in the decree entitling them to be heard herein and *must* be made parties to this appeal through their representative, the trustee in bankruptcy, or be severed in proper action taken therefor.

WHEREFORE Appellees Mary Rose, Ray L. Rose, Joe Ramos, Lillian M. Erwin, Luther M. Frink, E. Dale Frink, John H. Digges, Billie Lieber, Hattie M. Lieber, Hattie Schneider Lieber, Henry F. Lieber, Henry Lieber Jr., Herman Lieber, and R. E. L. Shepherd, Receiver in Bankruptcy, ask this Honorable Court to dismiss the appeal filed by Security Building and Loan Association, a corporation, and Ben H. Dodt, State Court Receiver, Appellants herein, at their costs.

Alice M. Birdsall

ALICE M. BIRDSALL,

Counsel for Mary Rose, Ray L. Rose, Joe Ramos, Lillian M. Erwin, Luther M. Frink, E. Dale Frink, John H. Digges, Billie Lieber, Hattie M. Lieber, Hattie Schneider Lieber, Henry F. Lieber, Henry Lieber, Jr., Herman Lieber, Intervening Petitioning Creditors, Appellees.

Thomas W. Nealon

THOMAS W. NEALON,

Counsel for R. E. L. Shepherd, Receiver in Bankruptcy, Appellee.

MOTION TO AFFIRM

And in the alternative, the said Appellees, Mary Rose, Ray L. Rose, Joe Ramos, Lillian M. Erwin, Luther M. Frink, E. Dale Frink, John H. Digges, Billie Lieber, Hattie M. Lieber, Hattie Schneider Lieber, Henry F. Lieber, Henry Lieber, Jr., Herman Lieber, and R. E. L. Shepherd, Receiver in Bankruptcy, also move this court to affirm the said Judgment and Decree entered by the District Court of the United States for the District of Arizona, on the 29th day of September, 1932, from which Judgment and Decree the appeal in the above entitled cause purports to have been taken, with costs to said Appellees, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Alice M. Birdsall

ALICE M. BIRDSALL,

Counsel for Mary Rose, Ray L. Rose, Joe Ramos, Lillian M. Erwin, Luther M. Frink, E. Dale Frink, John H. Digges, Billie Lieber, Hattie M. Lieber, Hattie Schneider Lieber, Henry F. Lieber, Henry Lieber, Jr., Herman Lieber, Intervening Petitioning Creditors, Appellees.

Thomas W. Nealon

THOMAS W. NEALON,

Counsel for R. E. L. Shepherd, Receiver in Bankruptcy, Appellee.

UNITED STATES OF AMERICA,
DISTRICT AND STATE OF ARIZONA, } ss.
COUNTY OF MARICOPA,

ALICE M. BIRDSALL and THOMAS W. NEALON, being each duly sworn, each for herself and himself, and not one for the other, doth depose and say: I have read the within Motion to Dismiss, and in the alternative, Motion to Affirm, in the above entitled matter and know the contents thereof; and that the statements contained therein are true according to the best of my knowledge, information and belief.

Alice M. Birdsall

ALICE M. BIRDSALL.

Thomas W. Nealon

THOMAS W. NEALON.

Subscribed and sworn to before me this 13th day of May, 1933.
(Seal)

Bess M. White

BESS M. WHITE,
Notary Public in and for Maricopa County, Arizona.

My commission expires June 18, 1935.

STATEMENT OF FACTS RELATING TO MOTION TO DISMISS AND MOTION TO AFFIRM.

On November 16, 1931, a receiver was appointed by the Superior Court in and for Maricopa County, Arizona, for Security Building and Loan Association, a corporation, in cause numbered 35883 of said court, the receiver being vested with full power and author-

ity to take over the assets of said corporation and liquidate the same, and said receiver immediately took over all assets of said corporation. The order appointing the receiver was entered on the same day the action was filed, the Security Building and Loan Association, through its officers, having entered an appearance on the same day and offering no defense to the proceedings.

On January 5, 1932, an involuntary petition in bankruptcy was filed against said corporation by John H. Spurlock, Ted Dempsey and W. L. Selman, the act of bankruptcy set up being the appointment of the receiver in the state court.

Subsequently and on January 21, 1932, upon order of court authorizing them to do so, Mary Rose, Ray L. Rose and Joe Ramos, intervened and filed their petition in involuntary bankruptcy, and on the 23rd day of January, 1932, R. E. L. Shepherd was appointed receiver in the bankruptcy proceedings. The Rose petition was subsequently amended by leave of court and on March 14, 1932, Lillian M. Erwin, by leave of court, intervened and joined in the petitions theretofore filed. On March 15, 1932, on order of court permitting such action, Luther M. Frink, E. Dale Frink, John H. Digges, Billie Lieber, Hattie M. Lieber, Hattie Schneider Lieber, Henry F. Lieber, Henry Lieber, Jr. and Herman Lieber filed an intervening joining petition jointly with the amended petition of Mary L. Rose, Ray L. Rose and Joe Ramos. In all of the petitions the appointment of the receiver in the state court was alleged as an act of bankruptcy. On March 14, 1932, the Security Building and Loan Association filed its answer, in which it admitted insolvency and the act

of bankruptcy, namely,—the appointment of the receiver, but defended on the ground that it was within a class excepted from the provisions of the bankruptcy act. This answer was by stipulation allowed to apply as an answer to the petition of Luther M. Frink and others filed on March 15, 1932. These matters are not in dispute and all appear from the record in the case.

On May 23, 1932, Ben H. Dodt, the receiver appointed by the Superior Court of Maricopa County, Arizona, filed his answer to all the involuntary petitions and participated as a party defendant in the trial of the issues had before the District Court of the United States for the District of Arizona beginning May 24, 1932. The record discloses no order made by said District Court permitting said Dodt to become a party to the proceedings in the United States District Court and no order made by the Superior Court of Maricopa County, Arizona, authorizing him either to appear in the bankruptcy proceedings in the United States District Court, or to prosecute an appeal from the decree of adjudication made in said cause on September 29, 1932.

Attached hereto, marked Exhibit "A" are certified copies of records of the Superior Court of Maricopa County in said receivership proceeding.

On October 20, 1932, the District Court of the United States for the District of Arizona, entered its order allowing an appeal herein to this court, and fixing the cost bond on appeal at Five Hundred Dollars. (Transcript, pages 743-745.) No supersedeas bond was filed staying the proceedings in the bankruptcy court.

On October 25, 1932, a first meeting of creditors of said Security Building and Loan Association was held at which meeting William McRae was elected trustee in bankruptcy, and on October 25, 1932, said McRae qualified as such trustee. Attached hereto, marked Exhibit "B" is certified copy of record showing appointment and qualification of trustee.

The appeal herein is attempted to be prosecuted by the Security Building and Loan Association, a corporation, through its officers, and by Ben H. Dodt as receiver of said corporation in the state court, as appellants, naming John H. Spurlock, Ted Dempsey, W. N. Selman, Mary Rose, Ray L. Rose, Joe Ramos, Lillian M. Erwin, Luther M. Frink, E. Dale Frink, John H. Digges, Billie Lieber, Hattie M. Lieber, Hattie Schneider Lieber, Henry F. Lieber, Henry Lieber, Jr., Herman Lieber and R. E. L. Shepherd, Receiver in Bankruptcy, as appellees. No attempt has been made to join in the appeal the trustee in bankruptcy, or to take proceedings for severance.

The record on appeal was filed in this court on March 2, 1933.

BRIEF OF THE ARGUMENT

I.

Appellants without authority to prosecute this appeal.

(a) The officers and directors of bankrupt corporation were and are without authority to prosecute this appeal on its behalf.

An appeal must be taken by a party aggrieved.

Gilbert's Collier on Bankruptcy, 2nd Ed. Sec. 25, P. 600.

After the appointment of a receiver, the officers of the corporation have no authority to bind the corporation or act for it respecting its property or affairs.

The appointment of a receiver operates the same as an injunction against the officers taking further action.

Cook on Corporations, 7th Ed., Vol. 4, Sec. 866, p. 3322.

Fiduciary relations of corporate officers or directors are terminated when a receiver is appointed and the officers are enjoined from any further acts relating to the management of the business.

Fletcher Cyc. Corporations, Vol. IV, Sec. 2280; p. 3521;

In re Allen-Foster-Willett Co., 116 N. E. 875;

Linville v. Hadden, 88 Md. 594, 41 Atl. 1097;

High on Receivers, Sec. 290.

(b) The receiver, Ben H. Dodt, appointed by the Superior Court of Maricopa County, Arizona, is without authority to prosecute this appeal, not having obtained authority so to do by order of said Superior Court, whose officer he is.

A receiver cannot sue without leave of court.

High on Receivers, 4th Ed. Sec. 208.

Fletcher Cyc. Corporations, Vol. 8, Par. 5324.

Par. 3884, Rev. Stat. Arizona, 1928, provides that a receiver may "subject to the control of the court" bring and defend actions.

> "If the statute gives a receiver power to sue in his own name 'under control of the court' he cannot bring an action in his own name without leave of court."
>
> 53 C. J., Sec. 535, p. 322.
>
> 23 R. C. L., p. 124.

II.

The trustee in bankruptcy is a necessary and indispensable party to this appeal.

The appeal sought to be prosecuted in this case is from a decree of adjudication of bankruptcy and no supersedeas bond has been filed staying the proceedings in bankruptcy.

From the time of the adjudication and the commencement of bankruptcy administration, every creditor is a party having an interest in said decree entitling him to appear and be heard in further proceedings. From and after the election and qualification of the trustee he has been the only representative of *all* the creditors and therefore a necessary and indispensable party to this appeal.

Without a supersedeas an appeal never suspends the execution of an order nor stops its enforcement.

In re Brady, 169 Fed. 152.

All the parties interested in the proceeding should be made parties to the appeal and should be given notice of its pendency and hearing.

Gilbert's Collier on Bankruptcy, 2nd. Ed. Sec. 25, p. 600;

Cyc. Fed. Proc. Vol. 6, Sec. 2677, p. 22;

Stevens v. Nave-McCord Co. (C. C. A. 8th) 17 A. B. R. 609, 150 Fed. 71;

Davis v. Mercantile Trust Co., 152 U. S. 590, 38 L. Ed. 563, 14 Sup. Ct. Rep. 693;

Wilson v. Kiesel, 164 U. S. 248, 41 L. Ed. 422, 17 Sup. Ct. Rep. 124;

In re Carasaljo Hotel Co. (C. C. A. 3rd) 8 Fed. (2) 469.

It is held that on decree refusing adjudication, creditors other than the original petitioning creditors who have intervened and joined in petition must join or be severed on appeal, and appeal was dismissed for want of jurisdiction.

In re Dandridge & Pugh (C. C. A. 7th) 209 Fed. 838;

Conversely, it would seem that on appeal from decree of adjudication, where no stay is taken, all the creditors, through their representative, the trustee, must be joined or severed.

ARGUMENT

PARAGRAPH I.

It is the belief of the appellees appearing here that their Motion to Dismiss should be granted for the reason that this court is without jurisdiction to hear the appeal attempted to be prosecuted because there are no proper parties appellant before the court.

So far as the bankrupt, Security Building & Loan Association, a corporation, is concerned it is earnestly contended by these appellees that the officers and directors of that corporation were and are not only estopped, but precluded, from taking any action in these proceedings on behalf of said corporation for the reason that from and after the appointment of the receiver in the Superior Court of Maricopa County, Arizona, on the 16th day of November, 1931, and the surrender to the receiver of all the property and assets of said corporation on said date, the powers and duties of the officers of the corporation were as effectively suspended as though the corporation were dissolved, and that any attempted action by said officers or directors purporting to bind said corporation in prosecuting this appeal is void and of no effect.

It is not disputed, and the record clearly shows, that from the 16th day of November, 1931, when the receiver was appointed in the Superior Court of Maricopa County, Arizona, up to the time of the appointment of the Receiver, R. E. L. Shepherd, in the bankruptcy proceedings, all the assets of the corporation were in the hands of the receiver appointed by the state court, and the affairs of the corporation were

being administered under the direction of the state court. This is admitted in the answer of Ben H. Dodt, state receiver, (Transcript, pages 152 and 153) and also in the answer of the bankrupt, (Transcript, page 102).

The law is well settled that the appointment of a receiver who takes over all the property and assets of a corporation suspends all powers of the officers and directors, and all their authority over its property and effects.

> "The appointment of a receiver over a corporation is generally equivalent to a suspension of its corporate functions and of all authority over its property and effects."
>
> High on Receivers, Sec. 290.
>
> "Where the corporation is in the hands of a receiver the right of action by the receiver to protect the interest of the corporation is exclusive."
>
> Klein v. Peter, (8 C. C. A.) 284 Fed. 797.
>
> See also
>
> Cook on Corporations, 7th Ed., Vol. 4, Sec. 866;
> Fletcher Cyc. Corp., Vol. IV, Sec. 2280;
> Re Allen-Foster-Willett Co., 116 N. E. 875;
> Linville v. Hadden, 88 Md. 594, 41 Atl. 1097;

It seems to these appellees that little argument is needed to show that it would be entirely preposterous to permit those officers of a corporation, who had months before surrendered its assets and admitted

insolvency and the act of bankruptcy, to bind the corporation and involve it in expensive litigation affecting the assets and property of the corporation, which according to its sworn answer in these proceedings, were being administered by the Superior Court of Maricopa County, Arizona, through its officer, the state receiver.

This brings us to the next proposition advanced, namely, that the state receiver, Ben H. Dodt, appellant herein, not having obtained the authority of the Superior Court of Maricopa County, Arizona, so to do, is clearly without authority to prosecute this appeal.

That a receiver cannot sue without leave of court is too well established to need argument.

> High on Receivers, 4th Ed. Sec. 208; Fletcher Cyc. Corp., Vol. 8, Par. 5324.

Paragraph 3884, Revised Statutes of Arizona, 1928, provides:

> "The receiver may, *subject to the control of the court*, bring and defend actions." (Italics ours.)

This clearly puts the court in "control" of all such actions, and requires authority of the court to proceed.

> 53 C. J., Sec. 535; 23 R. C. L., page 124;

Certainly a receiver in a state court would not be permitted to jeopardize the property and effects of the corporation being administered by him by in-

volving the corporation in expensive litigation in another court without first having authority from the court whose officer he is to so proceed. The record clearly shows that Ben H. Dodt was not made a party in the District Court of the United States for the District of Arizona, either by being named in the involuntary petition and intervening petitions of creditors, or by petition on his part to intervene in said proceedings. He simply appeared on May 23rd, 1932, and filed an answer without leave of court. (Transcript page 149). Neither in the proceedings in the District Court, nor in the proceedings on this appeal, does he appear under any authority from the Superior Court of Maricopa County, Arizona, whose officer he is, and appellees urge that his action in attempting to prosecute this appeal is void and of no effect.

These appellees contend, therefore, that this court is without jurisdiction for lack of proper parties appellant.

PARAGRAPH II.

These appellees further urge that this court is without jurisdiction to entertain the appeal attempted to be prosecuted herein because of the failure to join the trustee in bankruptcy as a party to said appeal, or to sever him by proper proceedings, the trustee in bankruptcy being a necessary and indispensable party to the appeal as the only representative of *all* the creditors of said bankrupt, after the adjudication in bankruptcy, no supersedeas bond having been filed staying the administration of the estate in the bankruptcy court.

Up to the time of the adjudication, or the dismissal of the petition in bankruptcy every creditor has the right to appear in the proceedings and either join in the petition for adjudication or be heard in opposition thereto.

Sec. 59f, Bankruptcy Act. (This provision has not been changed by recent amendments)

After an adjudication and the election of a trustee, no creditor, as a matter of right, can take an appeal unless the trustee refuses to do so. Of course this does not apply to any creditor who has theretofore either joined in the petition or appeared in opposition thereto. But other creditors, as a whole, are from and after the election of the trustee, represented by the trustee, and he alone can take an appeal.

"Where the creditors as a body are aggrieved, the trustee only should appeal."

Gilbert's Collier on Bankruptcy, page 600.

The creditors of this corporation, as a body, are certainly parties vitally interested in this appeal, and it would seem to be indubitable that their representative, the trustee in bankruptcy, must be joined and given an opportunity to appear for them on the appeal, and failure to make him a party deprives this court of jurisdiction to hear the appeal.

In the case of In re Dandrige & Pugh, 209 Fed. 838, decided by the Circuit Court of Appeals for the Seventh Circuit, an appeal was dismissed for want of jurisdiction for failure to join or sever, creditors who

had intervened and joined in the petition in bankruptcy.

The general rule that parties against whom judgment or order is rendered must unite in appeal is applicable to bankruptcy proceedings.

> Gilbert's Collier on Bankruptcy, 2nd Ed., page 600;
>
> Stevens v. Nave-McCord Co., 150 Fed. 71 (C. C. A. 8th);
>
> In re Carasaljo Hotel Co., 8 Fed. (2) 469 (C. C. A. 3rd).

The general rule with regard to necessity of joining all parties affected by a judgment in the appeal, or severing by proper proceedings is forcefully stated by the Supreme Court of the United States in the case of Davis v. Mercantile Trust Co., 152 U. S. 590, 38 L. Ed. 563, 14 Sup. Ct. Rep. 693, wherein a case was dismissed for lack of jurisdiction for failure to join necessary parties.

See also

> Wilson v. Kiesel, 164 U. S. 248, 41 L. Ed., 422, 17 Sup. Ct. Rep. 124.

A different situation might have existed here had a supersedeas been filed, staying the administration of the estate in bankruptcy, but without such stay, and with the administration of the estate proceeding, these appellees urge that the trustee in bankruptcy is a necessary and indispensable party to this appeal.

Appellees submit, therefore, that this appeal should be dismissed for lack of jurisdiction in this court.

Since the above authorities and discussion cover all matters contained in the alternative "Motion to Affirm," in the interest of brevity no separate argument is submitted in connection therewith.

Respectfully submitted,

Alice M. Birdsall

ALICE M. BIRDSALL,

Counsel for Mary Rose, Ray L. Rose, Joe Ramos, Lillian M. Erwin, Luther M. Frink, E. Dale Frink, John H. Digges, Billie Lieber, Hattie M. Lieber, Hattie Schneider Lieber, Henry F. Lieber, Henry Lieber, Jr. and Herman Lieber, Intervening Petitioning Creditors, Appellees.

Thomas W. Nealon

THOMAS W. NEALON,

Counsel for R. E. L. Shepherd, Receiver in Bankruptcy, Appellee.

EXHIBIT "A"

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

ENNIS TABER, *Plaintiff,* vs. SECURITY BUILDING AND LOAN ASSOCIATION, a corporation, *Defendant.*	No. 35883-A APPEARANCE OF DEFENDANT.

NOW COMES Security Building and Loan Association, a corporation, by its President and Assistant Secretary, and appearing in the above entitled action admits that the said defendant has received and has been duly served with a copy of the complaint and application for receiver filed in the above entitled matter, and has been duly served with summons and with the order to show cause why a receiver should not be appointed, setting the hearing of the application for receiver for November 16, 1931, at 9:30 o'clock in the forenoon of said day and defendant has no objection to said application for receiver being heard on said 16th day of November, 1931, at 9:30 o'clock in the forenoon, or thereafter.

DATED at Phoenix, Arizona, this 16th day of November, 1931.

SECURITY BUILDING AND LOAN ASSOCIATION
By D. H. SHREVE,
President.

(SEAL)

By R. F. WATT,
Assistant Secretary.

ENDORSED NO. 35883-A
Filed at.....M Nov. 16, 1931
WALTER S. WILSON, *Clerk*
By L. H. BUCK, *Deputy.*

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

ENNIS TABER, *Plaintiff,* vs. SECURITY BUILDING AND LOAN ASSOCIATION, a corporation, *Defendant.*	No. 35883-A ORDER SUBSTITUTING NEW RECEIVER

NERI OSBORN, JR., having been appointed Receiver of the property, assets, effects and affairs of the Security Building and Loan Association, an Arizona Corporation, on the 16th day of November, 1931, and having on the said day qualified as such receiver, and having filed his Report and having tendered his resignation as such receiver,

NOW, upon motion of Baker and Whitney and Lawrence L. Howe, his attorneys, and good cause appearing therefor,

IT IS HEREBY ORDERED that B. H. Dodt be and he hereby is appointed receiver of the Security Building and Loan Association, an Arizona corporation, in the place and stead of said Neri Osborn, Jr., and he is hereby given all the powers and rights heretofore vested in said Neri Osborn, Jr., as such receiver, and all the conditions and provisions of the original order appointing said Neri Osborn, Jr., as such receiver, are hereby made applicable in connection with the appointment of B. H. Dodt, the receiver now substituted in place of the said former receiver, Neri Osborn, Jr.

IT IS FURTHER ORDERED that said B. H. Dodt upon executing and filing with the Clerk of this court a bond to the State of Arizona in the penal sum of $25,000.00 conditioned that he will faithfully discharge the duties of Receiver and obey the orders of the Court herein, and upon such bond being filed, the Clerk of this Court will issue a Certificate of appointment and/or substitution.

IT IS FURTHER ORDERED that upon the approval of the Account and Report of Neri Osborn, Jr., receiver, that he be discharged and that upon the delivery of all of the property, assets and effects of the Security Building and Loan Association, an Arizona corporation, by said Neri Osborn, Jr., to said B. H. Dodt and the filing of a receipt from said B. H. Dodt showing such delivery to him of the property, assets and effects of said Security Building and Loan Association, an Arizona corporation, that the bond filed with and approved by this Court on the 16th day of November, 1931, in the sum of $25,000.00, executed

by said Neri Osborn, Jr., as principal and American Bonding Company of Baltimore as surety, be discharged from any further liability by virtue of said bond and by virtue of said Neri Osborn, Jr's appointment as such Receiver.

Done in Open Court this 14th day of December, 1931.

M. T. PHELPS,
Judge.

ENDORSED NO: 35883-A
FILED AT.....M. DEC. 14, 1931
WALTER S. WILSON, *Clerk*
By G. F. ELLSWORTH, *Deputy*

IN THE SUPERIOR COURT
Of Maricopa County, State of Arizona

ENNIS TABER,
Plaintiff,
vs.
SECURITY BUILDING AND LOAN ASSOCIATION, a corporation,
Defendant.

No. 35883-A

I, WALTER S. WILSON, Clerk of the Superior Court of Maricopa County, State of Arizona, do hereby certify the foregoing to be full, true and correct copies of the original

APPEARANCE OF DEFENDANT

ORDER SUBSTITUTING NEW RECEIVER

on file and of record in my office in the above entitled cause. That the same constitute a full and complete exemplification of the

APPEARANCE OF DEFENDANT
ORDER SUBSTITUTING NEW RECEIVER

in the said cause, and of the whole thereof.

All of which I have caused to be exemplified according to the act of Congress.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this 13th day of May, A. D., 1933.

WALTER S. WILSON,
(SEAL) *Clerk of the Superior Court.*

IN THE SUPERIOR COURT
Of Maricopa County, State of Arizona

ENNIS TABER,
Plaintiff,
vs.
SECURITY BUILDING AND LOAN ASSOCIATION, a corporation,
Defendant.

No. 35883-A

I, J. C. NILES, one of the Presiding Judges of the Superior Court of Maricopa County, State of Arizona, do hereby certify that said Court is a Court of Record having a clerk and Seal. That Walter S. Wilson, who has signed the annexed attestation, is the duly elected and qualified Clerk of said Superior Court. That said signature is his genuine handwriting, and that all his official acts, as such Clerk, are entitled to full faith and credit.

And I further certify that said attestation is in due form of law.

Witness my hand this 13th day of May, A. D. 1933.

(SEAL)

J. C. NILES,
Judge.

STATE OF ARIZONA
County of Maricopa } ss.

I, Walter S. Wilson, Clerk of the Superior Court of Maricopa County, State of Arizona, do hereby certify that the Honorable J. C. Niles whose name is subscribed

to the preceding Certificate, is one of the Presiding Judges of the Superior Court of Maricopa County, State of Arizona, duly commissioned and qualified, and that the signature of said Judge to said Certificate is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 13th day of May, A. D. 1933.

WALTER S. WILSON,
Clerk of Superior Court.

(SEAL)

EXHIBIT "B"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE FEDERAL DISTRICT OF ARIZONA.

In the Matter of Security Building and Loan Association, a corporation,
Bankrupt.
No. B-629—Phoenix—In Bankruptcy

CERTIFICATE AND COPY OF ORDER APPROVING TRUSTEE'S BOND

I, R. W. SMITH, Referee in Bankruptcy, in charge of the above entitled matter, do hereby certify that the copy of the Order Approving Trustee's Bond in said matter, hereto attached, is a true and correct copy of said order by me on the 25th day of October, 1932, and I further certify that the same is in full force and effect, and that William McRae is the duly appointed, qualified and acting Trustee in Bankruptcy in the above entitled matter.

GIVEN UNDER MY HAND as Referee in Bankruptcy this 17th day of January, 1933.

R. W. SMITH,
Referee in Bankruptcy.

I, J. LEE BAKER, Clerk of the United States District Court for the District of Arizona, wherein the above matter is pending, do certify that R. W. Smith is the duly qualified and acting Referee in Bankruptcy for the District, including Maricopa County,

Arizona, and that his signature attached to the foregoing certificate is genuine.

GIVEN UNDER MY HAND AND SEAL OF THIS COURT this 17th day of January, 1933.

J. LEE BAKER,
Clerk of the Court.
By GEORGE A. HILLIER,
Deputy.

(Seal)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE FEDERAL DISTRICT OF ARIZONA.

In the Matter of Security Building and Loan Association, a corporation.
No. B-629—Phx
In Bankruptcy

ORDER APPROVING TRUSTEE'S BOND

IT APPEARING to the Court that WILLIAM McRAE, of Phoenix, Arizona, has been duly elected Trustee of the above named bankrupt, and given his bond with the FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation, of New York City, New York, as surety for the faithful performance of his official duties in the amount fixed by the Order of this Court, to-wit: in the sum of Ten Thousand Dollars ($10,000.00),

IT IS ORDERED that said bond be and the same is hereby approved.

Dated this 25th day of October, 1932.

R. W. SMITH,
Referee in Bankruptcy.

No. 7099

IN THE

United States Circuit Court of Appeals

FOR THE

Ninth Circuit

In the Matter of Security Building & Loan Association, a Corporation,

Alleged Bankrupt,

Security Building & Loan Association, a Corporation,

Appellant,

vs.

John H. Spurlock, et al.,

Appellees.

BRIEF OF APPELLEES, Mary Rose, Ray L. Rose, Joe Ramos, Lillian M. Erwin, Luther M. Frink, E. Dale Frink, John H. Digges, Billie Lieber, Hattie M. Lieber, Hattie Schneider Lieber, Henry F. Lieber, Henry Lieber, Jr., Herman Lieber, and R. E. L. Shepherd, Receiver in Bankruptcy.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Alice M. Birdsall,
Thomas W. Nealon,
Counsel for said Appellees.

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No. 7099

IN THE

United States Circuit Court of Appeals

FOR THE

Ninth Circuit

In the Matter of the Security Building & Loan Association, a Corporation,

Alleged Bankrupt,

Security Building & Loan Association, a Corporation,

Appellant,

vs.

John H. Spurlock, et al.,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF AND ARGUMENT OF APPELLEES, Mary Rose, Ray L. Rose, Joe Ramos, Lillian M. Erwin, Luther M. Frink, E. Dale Frink, John H. Digges, Billie Lieber, Hattie M. Lieber, Hattie Schneider Lieber, Henry F. Lieber, Henry Lieber Jr., Herman Lieber, and R. E. L. Shepherd, Receiver in Bankruptcy.

NATURE OF THE CASE

The "statement of the case" made by appellants in their brief, pages 1 to 9, with the exception of the argument and comment interjected therein, is apparently accurate and in the interest of brevity we will not repeat it here.

POINTS AND AUTHORITIES

I.

The findings of fact are sufficient to sustain the decree and no exception having been made thereto, and no assignment of error having been made that they are not sustained by the evidence, the decree should be sustained.

Sexton vs. American Trust Co., 17 A B R (NS) 36 (Iowa 8th C C A); 45 Fed. (2) 372;

Sheffield & Birmingham, C I & R Co. v. Gordon, 38 Law Ed 164; 151 U. S. 285;

Armstrong v Fernandez, 52 Law Ed 514; 208 U S 324-332.

II.

No objections or exceptions having been made to the findings of fact, nor additional findings requested, and there being no objection to the form of the judgment, the findings cannot now be attacked.

Sexton v American Trust Co. 17 A B R (NS) 36 Iowa 8th C C A); 45 Fed. (2) 372;

Sheffield & Birmingham C I & R Co. v. Gordon, 38 Law Ed 164. 151 U. S. 285;

Armstrong v Fernandez, 52 Law Ed 514; 208 U S 324-332.

III.

The findings of fact are sufficient to sustain the conclusions of law made by the court and the decree entered thereon.

IV.

No fundamental error is involved in this appeal.

V.

The appellee is not a building and loan association within the meaning of the statutes of Arizona, the common law of building and loan associations, or the exceptions in the Bankruptcy Act.

Revised Code of Arizona 1928, Sections 612 to 628 incl.

Folk, Appellant v. State Capitol Savings Assn., 214 Penn. 593.

Wilkinson v. Mutual Building & Loan Assn., 13 Fed. (2nd) 997.

Standard Savings & Loan Assn. v. Aldrich, 163 Fed 216 (6th C C A).

VI.

The appellee is not a building and loan association

in that its corporate structure does not permit the issue of a building and loan stock and does not provide for the mutuality necessary to constitute a building and loan association.

Folk, Appellant v. State Capitol Savings Assn., 214 Penn. 593.

VII.

The appellee is not a building and loan association in that it is the alter ego of the Arizona Holding Corporation, this compay owning every share of stock of the appellee and the said Arizona Holding Corporation being incompetent under the law to become a member of a building and loan association.

Phoenix Safety Investment Co. v. James, 28 Ariz., 514; 237 Pac. 958.

U. S. v. Milwaukee Refrigerator Transit Co., 142 Fed. 247.

Rice v. Sanger Bros., 27 Ariz. 15; 229 Pac. 397.

VIII.

Corporations cannot be members of a building and loan association.

Morawetz on Private Corporations, Sections 431-433.

People ex rel Peabody v. Chicago Gas & Trust Co., 130 Ill. 268.

Standard Savings & Loan Assn. v. Aldrich, 163 Fed. 216 (6th C C A).

Handlesman v. Chicago Fuel Co., 6 Fed. (2nd) 163.

Endlich, Building Associations, 2nd Ed. 323.

IX.

No presumption arises from the use of the name that the bankrupt was engaged in a building and loan association business or was in fact a building and loan association.

Rhodes v. Missouri Savings & Loan Co., 173 Ill. 621.

Meroney v. Atlanta National Building & Loan Assn., 116 N C 882.

Lilley Building & Loan Assn., 280 Fed. 143.

United States v. Freed, 179 Fed. 236.

Home Building & Savings Co., 12 B T A 289.

Acklin v. Peoples Savings Bank, 293 Fed. 393.

X.

The bankrupt is not a building and loan association or entitled to any privileges thereof, in that there has been no user of the privileges it claims.

Elgin National Watch Co. v. Loveland, 132 Fed. 41.

XI.

For sometime before the state receiver was appointed November 16, 1931, the bankrupt had abandoned all pretense of doing a building and loan business and stood revealed as a fraudulent moneyed corporation, and therefore not coming within the exception in the Bankruptcy

Act. It therefore could not claim an exemption on account of a business it had abandoned.

XII.

No corporation can claim the benefit of an exception under a statute unless it comes strictly within the exception.

United States v. Dickson, et al, 10 Law Ed. 689, 15 Peters 141.

XIII.

The appellee was organized to do something less than either a bank or a building and loan association and never did, or attempted to do, any building and loan business.

Clemons v. Liberty Savings & Real Estate Corp., 61 Fed (2d) 448 (5th C C A).

XIV.

The appellee was not a banking corporation.

Clemons v. Liberty Savings & Real Estate Corp., 61 Fed (2d) 448.

XV.

No corporation can claim to come within the exception in the Bankruptcy Act exempting it from adjudication through the doing of ultra vires acts.

Clemons v. Liberty Savings & Real Estate Corp, 61 Fed. (2d) 448 (5th C C A).

XVI.

The evidence of conduct both before and after incorporation is competent and relevant to prove fraud from the inception of the formation of the corporation.

Wood v. United States, 10 Law Ed 987, 16 Peters 342.

XVII.

The right to amend as to jurisdictional facts was duly allowed by the court upon proper showing and no error has been predicated upon the allowance thereof by the Court.

Armstrong v. Fernandez, 52 Law Ed 541, 208 U S 324-332.

ISSUES

The question raised by the Assignments of Error of appellants is the correctness of the court's decree based upon the findings of fact and conclusions of law made by the court. No error is assigned as to the sufficiency of the evidence to sustain the findings of fact. No exceptions were taken to the findings of fact and no additional findings were requested, nor were any exceptions taken to the conclusions of law, nor were any additional conclusions requested.

Insolvency was admitted by the bankrupt; also the commission of the act of bankruptcy alleged (if the bank-

rupt were not a building and loan association) and appellant's answer set up that it was a building and loan association, leaving only one issue to be tried by the court. The issues presented on this appeal are:

I.

Is the bankrupt a building and loan association within the meaning of the exception in the Bankruptcy Act exempting such an association from adjudication in bankruptcy?

II.

Were the petitions in the bankruptcy proceedings filed by the creditors sufficient to invoke the jurisdiction of the court?

STATEMENT OF FACTS

The record discloses the following facts:

In the early part of the year 1929 an application was made to the Arizona Corporation Commission to obtain a charter for the Security Building and Loan Association, one E. T. Cusick, an attorney of Tucson, Arizona, taking up the matter on behalf of the prospective organization. There are in evidence various letters and telegrams between Mr. Cusick and the Arizona Corporation Commission, and the former also testified as to his recollection of the transactions. (Transcript, pages 232-240).

The data and records produced by Cusick showed

that many months previous to the time this application was made, a corporation known as the Arizona Holding Corporation had been formed in Tucson, Arizona, and a permit to sell stock in said corporation was issued by the Arizona Corporation Commission upon condition that 80% of all moneys received from sale of the stock was to be escrowed in a bank approved by the commission (subsequently shown to be the Consolidated National Bank of Tucson), and was not to be released without the consent or order of the Arizona Corporation Commission. (Transcript, pages 241-244).

The Arizona Holding Corporation permit to sell stock was obtained from the Arizona Corporation Commission in the year 1928 upon the supposition that its purpose in selling stock was to obtain money with the expectation of organizing a building and loan association in the future. (Transcript, page 240).

On January 24, 1929, Cusick sent to the Arizona Corporation Commission certificate of the Consolidated National Bank of Tucson indicating that $53,678.61 was on deposit at that time in said bank to the credit of the Arizona Holding Corporation. (Transcript, pages 236-237). However, the records of the Consolidated National Bank of Tucson show that $14,896.67 of this amount was represented by money borrowed upon the note of certain individuals for the sum of $15,000, less interest deducted under date of January 23, 1929.

(Transcript, pages 274-275)

On March 7, 1929, there was deposited with the

State Treasurer of Arizona on behalf of Security Building and Loan Association five ten-thousand-dollar certificates of deposit of the First National Bank of Prescott, being Certificates Nos. 14, 15, 16, 17 and 18 of said bank. (Transcript, page 207).

The articles of incorporation of the Security Building and Loan Association dated March 5, 1929, and filed with the Arizona Corporation Commission March 8, 1929, recite that $45,000 of the stock of said corporation "has been subscribed to and fully paid for by the Arizona Holding Corporation." (Transcript, page 83).

A "permit" to organize as a building and loan association was issued by the Banking Department of the State of Arizona to the Security Building and Loan Association on March 12, 1929. (Transcript, page 87). The by-laws of said Security Building and Loan Association were filed with the Arizona Corporation Commission on March 8, 1929. (Transcript, page 62). These by-laws were never recorded in any county in the state. Certificate of Incorporation was issued to said Security Building and Loan Association by the Arizona Corporation Commission September 5, 1929. (Transcript, page 202).

From the minutes of said corporation it appears that an organization meeting was held March 7, 1929 at which time resignations of the five incorporators of the company, to-wit, Louis T. Beach, E. T. Cusick, W. C. Evans, J. C. Barnes and H. V. Bell, were accepted, and a resolution was passed ordering the issuance of $50,000.00 of capital stock upon payment to the corporation of the sum of $50,000. (Transcript, pages 557-562).

On March 8, 1929, Certificate No. 11 of the Security Building and Loan Association for 350 shares of its stock was issued to Arizona Holding Corporation, this certificate being under same date marked "voided", and three certificates numbered 12, 13 and 14, for 100 shares each, and one numbered 15, for 50 shares, being issued in lieu thereof, to Arizona Holding Corporation ,all under date of March 8, 1929. (Transcript, pages 480-481). No other stock was issued at that time, the only other outstanding stock as of that date consisting of the transfer from the certificates of ten shares each which had been issued to the five incorporators. (Transcript, pages 477-478).

Subsequent to this date, telegraphic communications were had between Cusick and the Arizona Corporation Commission, relative to the release of the funds of the Arizona Holding Corporation escrowed in the Consolidated National Bank, as follows:

> March 9, 1929, Cusick wired the Commission:
> "Board of Directors Arizona Holding Corporation authorize me to request immediate release of their funds in the Consolidated National Bank of this city. Wire release to bank or me immediately. Formal application follows by mail."
>
> (Transcript, page 233)

To which the Commission replied on the same date as follows:

> "Your telegram too indefinite stop Wire reason for releasing money to Arizona Holding Company stop

Do you intend to finance Security Building and Loan Association or what is the money to be used for stop Commission will not act unless fully advised."

(Transcript, page 234)

On March 11, 1929, Cusick wired the Commission as follows:

"Tucson, Ariz. 8:40 A. Mar. 11, 1929.

Arizona Holding Company has already made loans and investments subject to release of funds stop Security Building and Loan Association independent of other company has fifty thousand up with Banking Department stop Please release funds before checks are dishonored and wire release or telephone me immediately."

(Transcript, page 235)

And also sent the following telegram to the Commission the same day:

"Please immediately wire release Twenty Thousand dollars Consolidated National Bank here. This must be here before three o'clock today."

(Transcript, pages 233-234)

On March 14, 1929, Cusick wrote the Arizona Corporation Commission, the letter being headed "Re: Arizona Holding Corporation", that on the 11th he had forwarded request for release of the following funds:

Consolidated National Bank	$32,936.81
Southern Arizona Bank and Trust Company	808.59

Arizona Southwest Bank 2,888.32

$36,633.72

stating "these sums are the amount remaining after deduction of $20,000 released by you on the 11th." Further in the letter he says: "This company (referring to Arizona Holding Corporation) is now doing business and has the opportunity to make loans and investments of advantage to it, and we respectfully urge your immediate attention to this matter."

(Transcript, pages 238-239)

March 18, 1929, the Arizona Corporation Commission wired Cusick as follows:

> "Commission authorizes release of all moneys held subject to our orders for Arizona Holding Corporation stop Have wired banks."

(Transcript, page 236)

The records of the First National Bank of Prescott and the testimony of its present cashier, P. H. Miller (Transcript, pages 204-209) disclose that on March 7, 1929, (the date of the deposit with the State Treasurer of the five certificates of deposit aggregating $50,000.00) the individual notes of Jos. E. Shreve, Glen O. Perkins and J. G. Cash, in the amount of $10,000 each, were given to that bank as part payment for the five certificates of deposit Nos. 14, 15, 16, 17 and 18, and that stock of the Security Building and Loan association was put up as collateral to the notes of Perkins and Cash. (Transcript, pages 204-206).

September 4, 1929, Certificate of Deposit No. 14 was released by the Treasurer of the State of Arizona upon the substitution by the Security Building and Loan Association of notes and mortgages in lieu thereof. October 8, 1929, the other four certificates of deposit, namely, Nos. 15, 16, 17 and 18, and the amount of $10,000.00 in mortgages and notes which had been substituted for No. 14 on September 4th were withdrawn from the State Treasurer, and a surety bond for $50,000.00 was substituted therefor. (Transcript, pages 207-209-94).

September 23, 1929, Certificate No. 14 for $10,000.00 was deposited to the account of the Security Building and Loan Association in the First National Bank of Prescott (Transcript, pages 205-207), and on October 9, 1929, Certificates Nos. 15, 16, 17 and 18, for $10,000.00 each, with accrued interest, were credited to the account of the Security Building and Loan Association in said bank, but on the same day, namely, October 9, 1929, $30,000.00 of this amount was withdrawn or withheld by the First National Bank of Prescott in payment of the three individual notes of Jos. E. Shreve, Glen O. Perkins, and J. G. Cash, each for $10,000. (Transcript, pages 205-206).

On September 21, 1929, there was assigned to Security Building and Loan Association a mortgage executed by Overland Hotel and Investment Company to William S. Millener, covering Lot 7, Block 257, Tucson, signed by Overland Hotel and Investment Company, a corporation by A. C. Shreve, Vice-President, and W. E.

Olson, Assistant Secretary, the mortgage being acknowledged September 23, 1929. The assignment of this mortgage from Millener to Security Building and Loan Association is dated September 21, 1929, and recorded October 7, 1929. (Transcript, page 211).

The property covered by this mortgage was deeded to Overland Hotel and Investment Company in 1928, subject to a mortgage of $12,000 given by Miguel Hidalgo and wife to Alianza Hispano Americana, due July 23, 1929, which mortgage was assumed by the Overland Hotel and Investment Company. (Transcript, page 664).

On October 7, 1929, the Security Building and Loan Association gave its check for $9,000 to the Arizona Holding Corporation, which check is endorsed by the latter Company to Alianza Hispano Americana Supreme Lodge. (Transcript, page 665).

The mortgage given by Hidalgo and wife to the Supreme Lodge of Alianza Hispano Americana was released on October 7, 1929.

(Transcript, page 664)

The annual report of the Overland Hotel and Investment Company dated January 26, 1929, as of the close of business April 30, 1929, shows that it was a Nevada corporation authorized to do business in Arizona, and lists as the only real estate owned by it at said time real property in Tucson, Arizona, of a value of $37,000. The report is sworn to by A. C. Shreve as Vice- President. (Transcript, pages 529-530).

The testimony of witnesses Ben Mathews and Judge E. R. Chambers of Tucson, at the trial of the case, identified the property covered by this mortgage as being property in the business district of Tucson adjoining the Santa Rita Hotel on which was located a garage, and the former placed its value in September, 1929, as from $30,000 to $32,000. (Transcript, page 277), and the latter placed its value at the same time as from $20,000 to $22,000.

(Transcript, page 285)

On or about October 22, 1929, a corporation known as the Century Investment Trust was organized, the incorporators being Glen O. Perkins, A. C. Shreve and V. Munter. The officers of said Century Investment Trust as shown by the report filed with the Arizona Corporation Commission June 30, 1930, are the following: President, J. H. Shreve, San Diego, California; Vice-President, D. H. Shreve, Phoenix, Arizona; Secretary, J. R. DeLatour, San Diego, California; Assistant Secretary, Glen O. Perkins, Phoenix,. Arizona.

(Transcript, pages 525-527)

November 15, 1929, Certificate No. 12 for 100 shares of Security Building and Loan Association stock issued to Arizona Holding Corporation on March 8, 1929, was endorsed to Century Investment Trust (Transcript, page 481), and the same condition exists with respect to Certificate No. 13 (Transcript, page 481). These 200 shares are transferred on the stock book and represented by Certificate No. 18, for 200 shares issued November 15,

1929, to Century Investment Trust (Transcript, page 483). Certificate No. 15 for 50 shares issued to Arizona Holding Corporation March 8, 1929, was endorsed to Century Investment Trust April 5, 1930, (Transcript, pages 482-483), and is presumably represented by Certificate No. 23 for 50 shares issued to Century Investment Trust December 16, 1930. (Transcript, page 485). Certificate No. 14 for 100 shares issued to Arizona Holding Corporation March 8, 1929, was endorsed to Century Investment Trust April 5, 1930, (Transcript, page 482), and is represented by Certificate No. 24 issued to Century Investment Trust September 4, 1931. (Transcript, page 485).

The stock sale report of the Century Investment Trust made to the Arizona Corporation Commission for the period from October 29, 1929, to December 31, 1929, inclusive, (Transcript, page 532) shows A. C. Shreve as having bought 250 shares of stock, paying to himself a commission of $50.00 thereon, and Glen O. Perkins as having bought 250 shares of stock, also paying to A. C. Shreve a commission of $50.00. Certificate No. 4 shows stock sale to Century Corporation of 530 "B" Street, San Diego, reported as cash received $42,000.00. Certificate No. 5, for 35,000 shares of common stock, together with Certificate No. 1 for 50,000 Series "A" stock, is listed as sold to Century Corporation of San Diego under title "Exchange of Stock". Certificate No. 37 for 1368 shares preferred stock, with Certificate No. 40 for 1368 shares of common stock, likewise goes to Century Corporation of San Diego assertedly for $34,200.00 cash. Certificate No.

98 for 1416 shares preferred, with Certificate No. 113 for 1416 shares common stock is listed to the same company at an alleged cash receipt of $35,400.00. Certificate No. 99 for 4,000 shares preferred, with Certificate No. 114 for 4,000 shares common, and Certificate No. 118 for 400 shares Series A is listed as sold to Arizona Holding Corporation for cash receipt of $100,000.00.

(Transcript, page 533)

From the date of its organization the capital stock of the Security Building and Loan Association, outside of the few shares issued for qualification for voting purposes of directors, and for which no consideration was paid, was held by the Arizona Holding Corporation until about the 15th day of November, 1929, and from that time on was held by the Century Investment Trust.

(Transcript, pages 477-486)

In November, 1931, there were issued and outstanding of the capital stock of the Security Building and Loan Association 450 shares, of which 420 shares were held by the Century Investment Trust and John C. Hobb. Glen O. Perkins and D. H. Shreve, each held ten shares. (Transcript, pages 477-486).

Paragraph VI of the Articles of Incorporation of the Security Building and Loan Association reads as follows:

> "That the amount of capital stock of this corporation is Five Million ($5,000,000.00) Dollars, and the number of shares into which it is divided is Fifty Thousand (50,000) of the par value of One Hundred

($100) Dollars each, all of which, when issued, shall be set apart as a fixed and permanent guaranteed capital. Additional working capital may be accumulted by the issuance of membership shares, units and certificates, both installment and fully paid as provided for in Chapter 76, 1925 Arizona Session Laws, and the By-Laws of this Corporation."

(Transcript, page 83)

This paragraph is followed by a paragraph in which it is stated that the amount of said capital stock which has been actually subscribed is $45,000.00, and the whole thereof has been subscribed to and fully paid for by the Arizona Holding Corporation, a corporation organized and existing under and by virtue of the laws of the State of Arizona.

(Transcript, page 83)

Article II of the By-Laws of said corporation relating to capital stock reads as follows:

"Capital Stock

Section 1. The capital stock of this corporation shall be Five Million ($5,000,000.00) Dollars divided into Fifty Thousand (50,000) shares of a par value of One Hundred ($100) Dollars each, all of which shall be a capital, and shall be issued at such times and in such amount as the Board of Directors may determine. It shall be sold upon subscription, at not less than par, payable not less than 50% at the time of subscription, and the balance as may be ordered by the Board of Directors. This stock is not withdrawable until final liquidation, and no loans shall

ever be made upon the pledge of any of its shares, as security, to the corporation.

Section 2. The majority of the Board of Directors shall always be selected from those holding ten or more shares of capital stock, and the minority may be selected from holders of membership shares.

Section 3. The capital stock shall participate in the net earnings of the association to the full extent permitted, or which may be permitted, under the provisions of the laws of the State of Arizona, and as interpreted by the Arizona Corporation Commission and/or the State Superintendent of Banks."

(Transcript, pages 63-64)

The "membership shares" of the Association are covered in Article VIII as follows:

"Membership Shares

Section 1. Membership shares having an ultimate matured or par value of One Hundred ($100) Dollars each *may* be issued *at such time and in such manner as the Board of Directors may prescribe,* or in accordance with the terms and provisions of the charter of this corporation.

Section 2. Membership shares may be classified as installment or full pay. Each subscriber to the installment shares shall become entitled to said shares when the payments made thereon, together with the profits apportioned thereto, shall amount to the sum of One Hundred ($100) Dollars for each of such shares, at which time the shares shall mature and

payments thereon shall cease. Full paid membership shares may also be issued at such times as the Board of Directors may determine to subscribers paying in the full face value of One Hundred ($100) Dollars per share. Dividends at such rate per annum as may be fixed by the Board of Directors, not exceeding a full participation in the net profits, shall be paid on these shares.

Section 3. Holders of either form of membership shares are members of the corporation, with all the rights, powers and privileges incident thereto, including the right to vote at all meetings of the shareholders and members—one vote for each share—and are subject to the same restrictions and liabilities.
Section 4. An entrance fee of not exceeding Two Dollars ($2) per share may be charged and collected upon all installment membership shares." (Italics Ours).

(Transcript, pages 71-72)

No action was ever taken by the Board of Directors authorizing issuance of any membership shares under the provisions of Article VIII of the By-Laws as appears from the minutes of said corporation (Transcript, pages 554-631), and no stock book or other record shows issuance of any such shares (Transcript, page 486).

Article IX of the By-Laws entitled "Investment Certificates" provides for the issuance of pass book as well as additional forms of investment certificates. (Transcript, pages 72-74). These various forms of investment certificates appear in the record.

(Transcript, pages 212-221)

Section 3 of Article IX of the By-Laws provides as follows:

> "Section 3. Holders of any of the forms of Investment certificates above designated are not members of the corporation, and have none of the rights, powers and liabilities incident thereto."

(Transcript, page 74)

In Section 1, subdivision 5, Article IV of the By-Laws entitled "Power and Duties of Directors" appears the following provision:

> "To borrow money for the purpose of making loans or with which to pay withdrawals or maturities".

(Transcript, page 66)

At a special meeting of the Board of Directors of the Security Building and Loan Association held on September 30, 1931, action was taken by said corporation whereby all real estate mortgages and contracts owned by the Security Building and Loan Association were transferrel to Century Investment Trust, a corporation, in consideration of a note to be given by said Century Investment Trust, a corporation, to said Security Building and Loan Association, payable in monthly installments of $2,500.

(Transcript, pages 626-627)

Said deal was consummated as of date October 1, 1931, the note received by said Security Building and

Loan Association being in evidence (Transcript, pages 265-266) and reading as follows:

> "$250,427.45 Phoenix, Arizona, Oct. 1, 1931. In monthly installments after date, for value received, we promise to pay to Security Building and Loan Association, or order, at Phoenix, Arizona, the sum of Two Hundred Fifty Thousand Four Hundred Twenty-seven and 45/100 Dollars, in monthly installments of Twenty-five Hundred Dollars and no/100th each, on or before the last day of each and every month following the date hereof until the entire sum shall have been paid with interest hereon from date at the rate of seven per cent (7%) per annum, payable monthly; said interest to be deducted from the monthly payment; principal and interest payable in lawful money of the United States. We hereby deposit with said Security Building and Loan Association as collateral, security for the payment of this note, mortgages and contracts on real estate as per list hereto attached.
>
> (Signed) Century Investment Trust,
>
> By D. H. Shreve, President,
>
> By Glen O. Perkins, Secretary."

On November 14, 1931, the Superintendent of Banks cancelled the permit of the Security Building and Loan Association to do business in Arizona. (Transcript, page 90).

On November 16, 1931, a Receiver was appointed for said Security Building and Loan Association by the Superior Court of Maricopa County, Arizona, in a suit

filed on the same day, this being the admitted Act of Bankruptcy on which the adjudication in Bankruptcy is predicated.

Some of the outstanding facts developed may be summarized as follows:

1. No stock of the Security Building and Loan Association was ever issued except capital stock to the amount of 450 shares, and this capital stock was never paid for.

2. There were no members of the Security Building and Loan Association, and no membership shares were ever issued.

3. No loans were ever made to members, in accordance with the provisions of the statute requiring every borrower to subscribe for shares of the company in an amount equal to the loan.

4. Withdrawals of funds deposited were allowed without notice and contrary to the provisions of the statute. In fact, money was borrowed from the banks by order of the Board of Directors to pay withdrawals.

5. All of the stock of the company, with the exception of thirty shares, was held by interlocking companies.

6. All of the assets of the company were transferred to the Century Investment Trust on October 1, 1931, in exchange for the note of that company, so that on November 14, 1931, the date of the commission of the al-

leged act of bankruptcy, the only asset of the Security Building and Loan Association was a promissory note of the Century Investment Trust.

BRIEF OF ARGUMENT

ISSUE NO. I., covering appellant's specifications of Error Nos. I and III (Assignments of Error Nos. I, II and III).

The court's finding of fact is sufficient to support the decree (T R 183-190), and no additional finding was requested. The pleadings being sufficient on their face to give the trial court jurisdiction, we do not think it is incumbent on this Court, in the absence of an Assignment of Error, to examine the evidence to see if the finding is supported by the evidence. We submit that the evidence does support the finding.

The evidence shows that the corporation was fraudulent in its inception; that the corporation was never formed with the intention of doing a building and loan business, but was a mere mask to defraud the public and particularly the people of Tucson and Phoenix, Arizona, through a fraudulent use of the mails for the aggrandizement of those who formulated the fraudulent scheme. Its Articles of Incorporation and corporate structure preclude the idea of its being a building and loan association or doing a building and loan business.

It was the alter ego of another corporation (The Arizona Holding Corporation) which owned all its capital

stock and which was not exempt from adjudication in bankruptcy, all of which is shown by the following evidence:

1. The individuals who devised the fraudulent scheme and consummated the fraud to the extent of defrauding the public to approximately $190,000.00, are:

Jesse H. Shreve,
A. C. Shreve,
Joseph E. Shreve,
Dan H. Shreve,
Glen O. Perkins,
J. G. Cash,
F. D. Arrington,
W. C. Evans,
W. E. Oleson,
W. S. Millener,
E. R. Kelly,
Valeria Munter,
J. R. DeLatour.

These, together with certain of their associates and employees carried out the fraudulent schemes.

2. The corporations involved having identity of ownership, or almost identical ownership, were:

Arizona Holding Corporation, owner of all of the stock of the bankrupt corporation;

Security Building and Loan Association, Bankrupt;

Century Investment Trust, organized by the same

group for the purpose of consummating the fraud;

Sunset Building and Loan Association of San Diego, California, one of the principle beneficiaries of the fraud;

Overland Hotel & Investment Company, whose officers manipulated the $30,000.00 fraudulent mortgage transaction;

Century Corporation, utilized in the exchanging of stock and padding of assets;

Southwest Securities Company, Shreve controlled;

3. The relationship of the parties to the various corporations was as follows:

J. H. Shreve, 546 B Street, San Diego, California:

Principal promotor of the Arizona Holding Corporation (T R 239-240);

Stockholder and owner of Certificate No. 1 for $10,000.00 (Pet. Ex. 51, photostatic insert between T. R. 530-531).

(Commission paid Glen O. Perkins on this transaction $2,000.00).

President and Director of Security Building & Loan Association (T R 462, 519, 559, 563, 564, 580, 583, 584, 588, 591, 599, 600, 604).

Chairman of Security Committee of Bankrupt (T R 586).

Chairman of Finance Committee (T R 586).

Appraiser for bankrupt (T R 587).

Promoter and endorser of note to procure original deposit, being one of the early frauds in the scheme (T R 206).

Endorser on Glen O. Perkins note, a part of same fraudulent transaction (T R 206).

Endorser on note of J. G. Cash (T R 206), part of same fraudulent transaction;

Pledger of 200 shares of Sunset Building and Loan stock, part of same transaction (T R 206).

President of Century Investment Trust (T R 527).

A. C. Shreve:

Vice-president and Director of Security Building & Loan Association (T R 221, 462).

Holder of $10,000.00 of stock of Arizona Holding Corporation (T R 531).

Vice-president of Arizona Holding Corporation, and the person who verified the report, Petitioner's Exhibit 49 (insert p. 531).

Incorporator of Century Investment Trust (T R 527).

Vice-president Overland Hotel & Investment Co. (T R 530, 566).

Assignee Yuma County fraudulent mortgage (T. R. 671).

Mortgagee in fraudulent Yuma County mortgage (T R 673).

Releasor fraudulent Yuma County mortgage (T R 673).

Joseph E. Shreve, Southwest Securities Company, San Diego, Calif.

One of those who borrowed money from First National Bank at Prescott for original deposit and deposited 100 shares of Sunset Building and Loan stock as collateral thereto, thus aiding the institution of the fraudulent corporation; (T R 205).

(The above note is endorsed by Jesse H. Shreve.)

Dan H. Shreve,

President, Director and active manager of bankrupt corporation during the latter days of its activity and participant in numerous fraudulent transactions hereafter enumerated (TR 103).

The individual who swears to bankrupt's answer as president of the corporation (T R 103).

Signer of fraudulent note of $250,429.45 together with Glen O. Perkins, to Century Investment Trust (T R 266).

Signer of many fraudulent appraisals, including one on 240 acres of desert land in Yuma County at $650 per acre, the actual value of the land being $10.00 per acre. This appraisal recites two buildings upon premises, with insurance of $9,-500.00 whereas there are actually no buildings on the premises (T R 333 to 361, inc.)

Fraudulent participant in Dreyfus, Arrington and Shumway loans (T. R. 350, 351).

Signer of J. M. Shumway check for $7,000.00, thereby fraudulently extracting $7,000.00 from the

assets of the bankrupt corporation (T R 497).

One of the individuals who induced J. M. Shumway, an employee, to sign blank notes and mortgages and thereafter set up a fraudulent loan thereon by means of which the bankrupt corporation was defrauded of $2,715.00, in addition to the above amount; (Insert opposite T R 497).

Vice-president of Century Investment Trust (T R 527).

President of Arizona Holding Corporation (T R 524).

Glen O Perkins:

Secretary and director of bankrupt corporation (T R 394, 563).

Assistant secretary Century Investment Trust (insert p. 533).

Incorporator of Century Investment Trust (T R 525).

Assistant secretary of Arizona Holding Corporation (T R 524).

An active participant in practically every fraudulent transaction.

E. R. Kelly:

A Director of bankrupt corporation; (T R 559).

Secretary and treasurer of Overland Hotel & Investment Co. (T R 530).

Participant in $30,000.00 fraudulent mortgage trans-

action (T R 530).

J. R. DeLatour:

Director of bankrupt corporation (T R 563, 631) Secretary Century Investment Trust (T R 527).

J. G. Cash:

Secretary and director of bankrupt corporation (T R 631).

Secretary of Arizona Holding Corporation (T R 524).

Valeria Munter:

Secretary of Overland Hotel & Investment Co. (T R 531).

Incorporator Century Investment Trust (T R 525).

F. D. Arrington:

Vice-president Overland Hotel & Investment Co. (T R 530).

Mortgagor who executed fraudulent mortgage of $34,000.00 on 120 acres of Yuma County desert land, not worth to exceed $10.00 per acre. (T R 674).

W. C. Evans:

Director of bankrupt corporation. (T R 83).

Participant in original fraudulent transaction in regard to procuring instruments for deposit with State Treasurer to secure license for bankrupt

corporation (T R 207 insert).

Incorporator of bankrupt; (T R 80).

W. E. Olson:

Assistant Secretary of Overland Hotel & Investment Company; (T R 211).

Signer of $30,000 mortgage (T R 211).

W. S. Millener:

Payee in $30,000.00 Overland Hotel & Investment Co. mortgage and assignor thereof (T R 211).

4. The methods by which the creditors of the bankrupt corporation were defrauded were as follows:

a) By obtaining control of the Arizona Holding Company when the promotors thereof were unable to raise the necessary capital and had only raised $36,000.00 out of the necessary $50,000.00.

b) By using a phony check of the Arizona Holding Corporation through the First National Bank of Prescott, Arizona, for $20,000.00, thus deceiving the attorney in charge of procuring the Articles of Incorporation for the bankrupt, and thereby causing him unintentionally to deceive the Arizona Corporation Commission as to the capital being paid in;

c) By putting up notes secured by stock not yet issued as collateral for $30,000.00 as a step in

the organization of the bankrupt without paying in any money on their capital stock;

d) By subsequently giving the bankrupt corporation's check for $30,000.00 on the First National Bank of Prescott to pay the individual notes of Joseph E. Shreve, Glen O. Perkins and J. G. Cash from the funds of the corporation;

e) By transferring from the funds of the bankrupt the sum of $9,000.00 to the Arizona Holding Corporation;

f) By transferring a $30,000.00 mortgage of the Overland Hotel & Investment Company to the bankrupt corporation upon a false appraisal of the property.

g) By the execution of fraudulent and dummy loans, extracting a further sum of many thousand dollars from the funds of the bankrupt corporation;

h) By assigning the above mentioned $30,000.00 mortgage to the Sunset Building and Loan, making a mere charge thereof on open account for same;

i) By false appraisals of property for the purpose of dummy loans;

j) By transferring much of the funds of the corporation to the Century Investment Trust;

k) By transferring much of the funds of the corporation to the Arizona Holding Corporation;

l) By deceiving the Banking Department of the State of Arizona and the State Treasurer of Arizona by false appraisals and false financial reports, thereby procuring license to operate as a building and loan association, including in said reports the issuance of fire insurance on non-existing buildings;

m) By transferring notes and mortgages of the face value of $250,427.45 to the Century Investment Trust in a fraudulent transaction;

n) By transferring mortgages, notes, etc., to the Sunset Building and Loan Association without consideration;

o) By inducing employees to sign notes and mortgages in blank, filling them in for fictitious values and extracting the money represented thereby from the assets of the corporation and reporting these as actual loans to the Banking Department of the State of Arizona;

p) By false transfers and exchanges of stock to bolster up the assets of the allied corporations;

q) By fictitious entries of payments of commissions on sales of stock in allied corporations;

r) By obtaining property of individuals through the issuance of fraudulent stock and manipulating same, placing dummy mortgages thereon, to withdraw funds from the assets of the bankrupt corporation; the assets going to the fraudulent promoters of this scheme;

s) By making excessive loans on churches and night clubs as a bait to the public, all in violation of the building and loan statutes;

t) By sending false and misleading circulars through the mail in aid of its fraudulent schemes and using the names of Chief Justice Hughes, ex-President Coolidge, and President Hoover, in a connection indicating that they endorsed the fraudulent schemes that were being perpetrated upon the public;

u) By releasing mortgages and having deeds made to the Arizona Holding Corporation to the extent of the face value of $110,000.00, on the eve of collusive receivership proceedings, thereby depriving the bankrupt corporation of valuable assets.

BANKRUPT NOT A BUILDING AND LOAN ASSOCIATION UNDER ITS ARTICLES OF INCORPORATION.

(a) The purposes set forth in the Articles of Incorporation are contrary to the Building and Loan Act. It was simply an ordinary corporation formed for the purpose of fraud and misleading the public into thinking that it was a building and loan association.

(b) Its by-laws did not comply with the building and loan statute and were never recorded as required by the Act.

(c) Its by-laws do not even attempt to comply with the Building and Loan Act.

(d) Article II of its Articles of Incorporation provide that the capital stock should be $5,000,000, divided into 50,000 shares of the par value of $100.00 each. The stock so provided for consists of ordinary corporate stock and that being the full extent of its authorized capital it could not without amendment of its Articles issue building and loan stock (T R 83).

(e) Article VII of its Articles of Incorporation provides as follows:

> "That the amount of said capital stock which has been actually subscribed is $45,000.00 and the whole thereof has been subscribed and fully paid for by the Arizona Holding Corporation, a corporation organized and existing under and by virtue of the laws of the State of Arizona." (T R 83).

(f) Article II of its By-laws provides that the stock provided for in Article VI of the Articles of Incorporation shall be sold upon subscription at not less than par, payable not less than 50 percent at the time of subscription and the balance as may be ordered by the Board of Directors.

> "This stock is not withdrawable until final liquidation and no loan shall ever be made upon the pledge of any of its shares as security to the corporation." (T R 63).

(g) Article IX of the By-laws provides for the issuance of investment certificates, something that is not authorized, nor contemplated in the Building and Loan Act of Arizona. (T R 72, 73, 74).

(h) Article XIV of the By-laws recites that the Arizona Holding Corporation is the owner of all of the subscribed shares of stock in the Security Building & Loan Association at Tucson, Arizona, except such as are subscribed and paid for by the incorporators. (T R 79). The record shows that no shares were paid for by the incorporators and that those that were issued to them were immediately transferred in blank and delivered back to the corporation.

(i) Article II of the Articles of Incorporation show a plan of accumulating funds contrary to the letter and spirit of the Building and Loan Statutes of Arizona (T R 81).

(j) The Articles fail to provide for any form of stock required by Section 612, Revised Code of Arizona, 1928.

NO USER OF ANY BUILDING AND LOAN PRIVILEGE

The corporation did not make any user of any building and loan feature of its Articles of Incorporation:

It accumulated no funds from members as provided for in Section 612 of the Code;

It invested no fund in loans to its members upon real estate for home purposes as provided in said Section;

It did not permit its members to elect directors as provided in Section 615;

It did not confine its loans to notes secured by first mortgage on improved real property or real property to be improved under contract with the Association as provided by Section 618;

It paid no attention to the restriction in said Section that its loan should not exceed sixty per cent of the conservative market value of the improved real property;

It made no loans in accordance with the requirements of said Section 618 that "no loan shall be made except upon the report in writing of three appraisers who shall be members of such Association and who shall report the conservative value of the property to be mortgaged."

It did not require its borrowers at the time of procuring a loan, or at any other time, to subscribe for an amount of stock in the Association equal to its loan, or provide that any such stock should be held as further security for said loan as provided for in said Section 618;

It had no members.

In general it did not attempt in any manner to comply with the provisions of Article IV of the Arizona Code of 1928, or of the Session Laws of 1925 under which it purported to be organized.

ARGUMENT

ISSUE NO. 1.—Specifications of Error Nos. I and III, (Assignments of Error Nos. I, II and III):

The bankrupt corporation does not come within any of the accepted definitions of a building and loan association, either in its corporate structure or its method of doing business, even if we should consider it separate and apart from its alter ego, the Arizona Holding Corporation, and even if we should eliminate the fact that it is a corporation fraudulent in its inception, designed and incorporated for the purpose of carrying out a mail fraud scheme; that all its operations from its first application for a certificate of incorporation to its last corporate act were fraudulent.

The facts in evidence as stated in the Transcript of Record and pointed out in this brief, show clearly that there was fraud from the inception of the corporation. This is proved by its conduct prior to the time of the granting of any right as a corporation by the State and by all of its subsequent acts, and under the rule laid down by Judge Story in Wood v United States, 10 Law Ed, 987, 16 Peters 342, fraud in the inception may be proven by the conduct subsequent, as well as by the prior conduct of the parties.

> "The other objection has as little foundation, for fraud in the first importation may be as fairly deducible from other subsequent fraudulent importations by the same party as fraud would be in the last importation from prior fraudulent importations. In each case the *quo animo* is in question, and the presumption of fraudulent intention may equally arise and equally prevail."
>
> *Wood vs. United States,* supra.

The outstanding characteristic of a building and loan association is mutuality. Without this quality there can be no such thing as a building and loan association whatever name it may travel under. The name itself does not give it this character.

> "It is merely a money lending dividend paying corporation, to which for some purpose, features of a building and loan association have been attached. The purposes and powers put it outside of the pale of the beneficent statute which was intended to encourage co-operation among the saving poor and not to aid the rich in finding good investments for their capital."
>
> *Rhodes v. Missouri Savings & Loan Co.* 173 Ill. 621.

The above quotation is taken from the case of Meroney vs. Atlanta Building & Loan Assn., 116 N. C. 882, 47 A. S. R. 841, quoted with approval in the Illinois case. The Illinois court continues:

> "A true building and loan association such as our statute provides for has no authority to declare or pay dividends on its stock. Instead of its funds being derived from small payments made monthly by its subscribers it may instead derive its entire fund by large subscriptions of thousands of dollars made by money lenders and capitalists, who thus in the guise of subscribers to stock in a so-called 'building association' are enabled to realize thirteen or fourteen percent interest on money invested. * * * Neither directly nor by implication is the issue of paid-up stock recognized by our statute."

and the Illinois court continuing thus distinguishes between such a corporation and a building and loan association:—

> "From this reasoning it may be concluded that an association which under the *GUISE OF A BUILDING AND LOAN ASSOCIATION* (ITALICS ours) derives its funds for loaning from the issue of what is known as 'paid-up stock' in the sum of $1,000.00 or from any other form of paid-up stock not authorized by the statute of this state to be issued by such an association and whose business is of such character as *MAKE IT IN FACT A LOAN COMPANY* (ITALICS ours), will be treated as such a company and will not, in the absence of other additional legislation, receive the benefits of the liberal statutes and decisions in this state which have attempted to foster these purely co-operative associations for building and saving purposes."

The Illinois Court quotes with approval from the case of Andrews v Poe, 30 Maryland, 485 (a case where the aim and purpose of the association did not bring it within the statute as a building association):

> "Every device and shift which the wit of man could suggest have been invoked to exempt contracts for illegal interest from the operation of the law, but courts should look under the mask to discover the true nature of the transaction."

A building and loan corporation is defined by Section 612 of the Civil Code of Arizona, 1928, as:

> "Organizations having for their object accumulations

by its *members* of their money by periodical payments into the treasury thereof to be invested from time to time in loans to the *members* upon real estate for home purposes." (Italics ours).

This is the accepted definition of a building and loan association. So a corporation formed for the purpose of accumulating its funds by payments from those other than its members or those who could not under the law become its members, and for the lending of money to persons who are not members or who could not become members, and loans not made for home purposes, cannot come within the definition prescribed by the statute.

The Section above referred to is the same as Section 1, Chapter 76, Session Laws of 1925.

Judge Endlich, the author of the accepted standard work on building and loan associations, in his opinion in the case of FOLK, APPELLANT vs. STATE CAPITAL SAVINGS ASSOCIATION, 214 Penn. 593, states the essential qualities in very clear language:

"It is, indeed, to be noted that the legislature has attempted no definition of what constitutes a building association. It has assumed that certain features and methods are essential to it, and there is no room for doubt that without them no corporation, whatever its label, can claim to be a building association. But it has not excluded the possibility that consistently with these essential features the legitimate development of the business of these associations may add others which at the date of the enactment were not foreseen and against which there-

> fore is not to be taken as implying any prohibition. Thus it is well understood to be one of the differentiating characteristics of the building association scheme that it affords an opportunity to shareholders to subscribe for stock payable in small periodical installments. A society discarding this feature could hardly be looked upon as within any definition of building association."

The feature which Judge Endlich was pointing out that might be added in addition to the stock payable on these installments was that the corporation could in a proper case allow to paid-up shareholders a periodical dividend, reasonably within the margin of profit shown by experience to be likely to accrue to the society on the sum thus paid, which dividend is understood to be payable only out of the profits earned and in lieu of any share therein upon winding up.

In this corporation every share of stock was owned by the Arizona Holding Corporation, an entity that was incapable of becoming a member of a building and loan association.

The rule is laid down in Endlich, Building Associations, (2nd Ed) p. 323, and is cited with approval in Handelsman v. Chicago Fuel Company, 6 Fed (2) 163, Judge Endlich's language being as follows:

> "It certainly does not appear to be consistent with the purpose of a building association's being, nor in any wise related to the policy which justifies the creation of these institutions, with the extraordinary powers they possess, *TO HAVE ITS MEMBER-*

SHIP IN PART COMPOSED OF CORPORATIONS, and there can be little doubt that the statutes never contemplated such a departure. (ITALCS ours).

We quote also from the decision by Judge Lurton in the case of Standard Savings & Loan Association vs. Aldrich, 89 C C A 646, 163 Fed. 216, wherein he says:

> "The investment of funds in the shares of a company organized for a like purpose is beyond the scope of the most liberal view of the incidental or implied power of such companies. The objects of such associations being only to lend the funds contributed by members for the purpose of building and improving homesteads, one such association could not become a member of another, nor could it lend its own funds except to its own members for the purpose indicated. The contention, therefore, that the Michigan Association could not legally become a member of the Standard Association, and that the latter could not legally lend its money to an association which was not and could not lawfully become a member, has not been inadvertently made. Thomps. Bldg. & L. Assn. 2d ed. p. 215 Sec. 114; 4 Am & Eng Enc Law, 2d ed. p. 1028; Kadish v Garden City Equitable Loan & Bldg. Assn. 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236; North American Bldg. Assn. v. Sutton 35 Pa 463, 78 Am. Dec. 349; Mechanics & W. Mut. Sav. Bank & Bldg. Assn. v. Meridan Agency Co. 24 Conn. 159".

See also the following authorities:

Morawetz on Private Corporations, Sections 431-432.

People ex rel Peabody v. Chicago Gas & Trust Co., 130 Ill. 268.

The Articles of Incorporation of this association provide for a capital stock of $5,000,000.00, all of one class, and that class the kind issued by any corporation incorporated under the general law; therefore, within its authorized capital it would have no authority whatsoever to issue membership shares. This could not be done unless it amended its Articles of Incorporation. For this reason it necessarily follows that it could have no members, could make no loans to members, and could not organize as a building and loan corporation as it purports to be from its name. That the name does not add anything to its character as a building and loan association, unless it has the essential qualities heretofore mentioned, is held in the following cases:

Rhodes v. Missouri Savings & Loan Co. 173 Ill. 621.

Meroney v. Atlanta National Bldg. & Loan Assn., 116 N. C. 882, 47 A. S. R. 841.

Lilley Building & Loan Assn., 280 Fed. 143.

United States v Freed, 179 Fed. 236.

Home Building & Savings Co., 12 B T A 289.

Acklin v. Peoples Savings Bank, 293 Fed. 393.

Every share of stock of the bankrupt being owned by the Arizona Holding Corporation, the bankrupt is merely the alter ego of the Arizona Holding Corporation, and for this reason cannot claim any privilege or exemption to which the Arizona Holding Corporation could not assert

a claim. Therefore, it being the alter ego of the Arizona Holding Corporation, as the facts and evidence clearly show, it could not claim to come within the exception in the Bankruptcy Act exempting building and loan associations from adjudication in bankruptcy.

The court having made its findings of fact, no exceptions being taken thereto, and no additional findings of fact being requested, we do not know how far the court may desire to go into the evidence. It is true that one of the facts to be found by the court was the jurisdictional fact that this corporation was not a building and loan association within the meaning of the Bankruptcy Act. However, this is a question of fact which the court had the jurisdiction to determine. It is not our conception of the law that it is the duty of the Appellate Court to wade through all of the testimony to ascertain whether the trial court made its finding of fact thereon upon sufficient testimony when there is no assignment of error that there is no evidence to support the finding of fact.

Armstrong vs. Fernandez, 52 Law Ed 514; 208 U S 324-332.

The bankrupt having been organized for a fraudulent purpose as the facts and evidence show, then the Court will disregard the corporate form in the interest of justice. This is as applicable to a situation where one corporation is the alter ego of another as it is in the case of individuals.

"Aside from the question as to whether or not The

French Shop Inc., was a corporation *de facto,* in this case it appears to us that we should apply a rule which has received the recognition of text-writers and courts, generally, viz., that a corporation may not be formed for the purpose of perpetrating a fraud or other illegal act, under the guise of the fiction that a corporation is a legal entity, separate and distinct from its members. *WHEN THIS IS ATTEMPTED, THE FICTION WILL BE DISREGARDED BY THE COURTS, AND THE ACTS OF THE REAL PARTIES DEALT WITH AS THOUGH NO CORPORATION HAD BEEN FORMED.* Cook on Corporations, vol. 3, 7th ed., Sec. 663; Donovan v. Purtell, 216 Ill. 629, 1 L. R. A. (N.S.) 176, 75 N. E. 334; 14 C. J. 61, Sec. 22, and cases cited.

"The more is the reason for this rule where the *INCORPORATORS* are themselves the *ALTER EGO* of the corporation, and the persons sought to be held as partners are the sole owners of the capital stock, and the sole managers and directors of the company. In this case the Rices were themselves the corporation. While the evidence of fraud as to the original purpose of the organization of the corporation is not so direct and plain as to be conclusive, yet the facts and circumstances as they developed during the two years of appellants' operations in Arizona with The French Shop, Inc., taken in consideration in connection with the very controlling factor that the Rices were the sole owners of the capital stock, the sole directors and the sole managers of the corporation, are sufficient to support the finding of fact that there was *FRAUD IN THE ORGANIZATION OF THE FRENCH SHOP, INC., FROM ITS INCEPTION.*

> This court has time and again decided that, where there is substantial evidence in the record to support the findings of the lower court, these findings will not be disturbed." (ITALICS ours).
>
> *Rice v. Sanger Brothers,* 27 Ariz. Rep. 15, 229 Pac. 397.

In order that the Court may have a clear picture of the fraud that has been perpetrated upon the people of Arizona, and especially upon the residents of Tucson and Phoenix, it is necessary to state some of the facts disclosed by the evidence in their chronological order.

Elsewhere in this brief, page 26, we have described the individuals who devised the fraudulent scheme and consummated the fraud to the extent of defrauding the public in a sum of approximately $190,000.00, and we have also set out their relationship to the bankrupt corporation and to the various corporations that have been used in the carrying out of the fraudulent schemes. (Pages 27-32 of this brief.)

Collating the facts and evidence in their chronological order, we find that the promotors of this scheme came from San Diego to Tucson about January, 1929 (T R 245) They found that Messrs. Mathews and Bilby, attorneys of high standing in Tucson, Arizona, had, at the instance of certain clients, filed Articles of Incorporation and prepared by-laws for the Arizona Holding Corporation. One of these individuals was Glen O. Perkins who became very active in the affairs of the bankrupt and of the Century Investment Trust subsequently. (T R 278).

The connection of Messrs. Mathews and Bilby with the corporation in question was short-lived, lasting only about a month. (T R 279). They had no connection whatever with the organization of the bankrupt corporation.

Under its permit to do business, the Arizona Holding Corporation was required to escrow all of its funds except such as paid for commissions on the sale of stock until it had raised the sum of $50,000.00 (T R 237). The funds were escrowed principally in the Consolidated National Bank of Tucson, Arizona. A tabulation of these deposits appears on page 276 of the Transcript of Record. It appears from this tabulation that the corporation in question was only able to sell stock sufficient to place in escrow the sum of approximately $36,000.00. (T R 236, 237,241,) $12,000.00 of which was deposited on January 23, 1929, and upon that date a non-operating loan was made and the funds deposited in this account in order to raise the sum on deposit to an amount in excess of $50,000.00, (T R 273-276), and as testified to by Mr. Zapeda: "That was deposited in their account and made up a part of the total shown in the account of the Arizona Holding Company at the times the funds were released from escrow."

It was at about this time that this loan was made, namely, January 23, 1929, that Jesse H. Shreve first appears in the picture at Tucson (T R 245), and on March 4, 1929, he gave two cashier's checks of $5,000.00 each drawn on the California Savings & Commercial Bank of San Diego, California, and another check of $5,000.00 is-

sued to him in payment of this note. This transaction took place on the 4th day of March, 1929 (T R 274-275). At the time the loan was made the Arizona Holding Corporation had on deposit in this bank only the sum of $32,821.94. By whom the deposit of $12,000.00 was made on January 23, 1929, is not shown. These dates become important in view of the transaction immediately following which occurred at Prescott, Arizona, with the First National Bank of Prescott.

On March 7, 1929, Joseph E. Shreve, Jesse H. Shreve, J. G. Cash and Glen O. Perkins appear at the First National Bank in Prescott, Arizona, when Joseph E. Shreve, J. G. Cash and Glen O. Perkins each borrowed $10,000.00 from that bank (T R 204-206). Joseph E. Shreve, whose address was care Southwestern Union Securities Corporation, San Diego, California, gave his note to the bank for $10,000.00 endorsed by Jesse H. Shreve and pledged as collateral 100 shares of Sunset Building and Loan Association (of San Diego) stock, of the par value of $12,-500.00. This note was paid on October 9, 1929. (See photostatic insert at page 205 of Transcript of Record). Glen O. Perkins gave his note for a like amount, also endorsed by J. H. Shreve, and secured by 200 shares of the Security Building and Loan Association stock, (this corporation not being then organized.) This note was paid October 9, 1929. At the same time J. G. Cash made his note for a like amount, endorsed by J. H. Shreve, and secured by 100 shares of the Security Building and Loan Association stock, (this corporation not then being organized or having any permit whatever.) This note was also

paid on October 9, 1929. (See insert between pages 206 and 207 of Transcript of Record). Each of these notes was paid by check of the Security Building and Loan Association on October 9, 1929. On March 7, 1929, at the time of the execution of the three notes of $10,000.00 each, hereinbefore mentioned, the First National Bank of Prescott issued five certificates of deposit of $10,000.00 each, payable to the Treasurer of the State of Arizona, payable six months after date and signed by W. C. Evans, Cashier of the said First National Bank at Prescott, (See insert between pages 206-207 of Transcript of Record). Mr. Evans was also one of the incorporators of the Security Building and Loan Association.

In addition to the $30,000.00 in notes heretofore mentioned the First National Bank of Prescott received in payment of these certificates, a check drawn by the Arizona Holding Corporation for $20,000.00 (T R 233). This check was drawn upon the fund placed in escrow with the Consolidated National Bank of Tucson and on which the Arizona Holding Corporation had no authority to draw. The purpose of obtaining these certificates of deposit from the First National Bank of Prescott was to put them up in lieu of the deposit required by the State of Arizona before a building and loan association could receive a permit to organize. Section 628, Revised Code of Arizona, 1928. We see that the initial step in procuring this permission to organize was the securing of these certificates of deposit by a fraudulent transaction, namely, the giving to the First National Bank at Prescott in payment thereof an unauthorized and illegal check of the

Arizona Holding Corporation and the pledging of shares of stock in the bankrupt corporation without having at that time any permit to organize.

Immediately following this there follows a frantic telegraphic correspondence between Mr. E. T. Cusick, attorney for the Security Building and Loan Association in the matter of procuring the necessary release of escrowed funds from the Corporation Commission, the whole purpose of which was to prevent the $20,000.00 check of the Arizona Holding Corporation from being dishonored. The perpetrators of this fraud evidently depended upon Mr. Cusick to secure the release of the funds of the Arizona Holding Corporation during the period required for the transmission of the check from Prescott to Tucson. Accordingly we find (T R 233) a telegram on March 9, 1929, from Mr. Cusick to the Corporation Commission requesting the release of the fund and stating that formal application would follow by mail.

In petitioner's Exhibit No. 28 (T R 234) appears the telegram of Mr. McBride secretary of the Corporation Commission stating that the telegram is too indefinite and asking Mr. Cusick to state the reason why the money should be released and asking the question if the Holding Company intended to finance the Security Building and Loan Association, or what the money was to be paid for. On page 235 of the Transcript of Record appears Mr. Cusick's reply stating that the Arizona Holding Corporation had made loans and investments subject to the release of the fund; that "the Security Building

and Loan Association independent of other company has $50,000.00 up with the Banking Department. Stop. Please release funds before checks are dishonored. Wire release or telephone me immediately."

It will be noted here that the Corporation Commission was being deceived as to the fact that the check that was about to be dishonored was the $20,000.00 check of the Arizona Holding Corporation. On the same date (T R 233) Mr. Cusick wired the Commission as follows:

> "Please immediately wire release $20,000.00 Consolidated National Bank here. This must be here before three o'clock today."

Evidently the check given at Prescott on the 7th had reached the Consolidated National Bank on the 11th and no arrangements had been made for its payment. On that date the Corporation Commission evidently authorized the release of $20,000.00 by telephone and subsequently on March 18, 1929, wired a release of the remaining funds of the Arizona Holding Corporation (T R 236).

We think the inference is fair that in view of the kiting transactions of the promotors of these enterprises that these funds were released in order to make good not alone on the check to the bank at Prescott, but the cashier's check drawn on the California Bank in favor of the Consolidated National Bank. We have to bear in mind the relationship of these San Diego parties to the financial institutions at San Diego.

On page 237 of the Transcript of Record is shown

the letter of Mr. Cusick showing the aggregate sums of the Arizona Holding Corporation to be $56,580,27. This was contained in a letter dated January 24, 1929.

In Mr. Cusick's letter of March 14, 1929, (T R 238) it states that the Arizona Holding Corporation was then doing business and had opportunity to make loans and investments to advantage. On page 240 of the Transcript of Record he states that he was handed Articles of Incorporation and the Permit No. 6060 for Investment Company 2280 and the By-laws of the Arizona Holding Corporation.

The next step in the program of the Shreves and their associates was the incorporation of the Century Investment Trust and securing the permit for the sale of stock therein. This corporation appears later as the record holder of a large portion of the stock of the bankrupt corporation. It appears also as the transferee just before the state receivership of the bankrupt of practically all of the assets of the corporation. The practical identity of the control of the corporation is shown at various points in the evidence.

Having secured the corporate forms for their organizations on March 8, 1929, the promotors were all ready to proceed with their scheme for defrauding the public by the use of the mails and they sent out through the mails the circulars set up on pages 633 to 655, inclusive, of the Transcript of Record. The documents are remarkable and plausible, but there will be found no connection between them and the recognized business of a

building and loan association. They were well calculated to deceive the unwary. They have set up, as if they were endorsing the scheme outlined, the approval of President Herbert Hoover as to building and loan associations, quoting him at length. (T R 643). They set up also a similar letter from Ex-President Calvin Coolidge to a Mr. Howell (T R 646), a letter from Chief Justice Charles E. Hughes, then Secretary of State (T R 647), and then we have their own pictures of themselves:

"THE MEN BEHIND THE SECURITY

> The successful business leaders who are directors of this institution and investors in its guaranteed capital stock warrant the solidity, safety and success of the Security Building and Loan Association. Combine with them by depositing your funds in the Association."

These instruments were disseminated through the mails (T R 633-655).

On the insert opposite page 553 of the Transcript of Record is the schedule of commissions paid upon new accounts, and as Miss Young testified: "I saw the schedule actually used in the payment of commissions for new accounts." She further testifies that they were paid by the Security Building and Loan Association. These are very significant because the payment of a minimum of two per cent additional for the securing of these accounts made it impossible for the bankrupt corporation to ever carry out any of the representations it made to the public in soliciting these accounts.

The method of doing business of this bankrupt corporation and the conclusive evidence of the fraudulent purposes and character thereof, we think, is shown on that part of the Transcript on pages 312 to 317 inclusive, where are listed the loans made by the Tucson office. We use these as an illustration because they are typical of the rest of the business of this corporation. An examination of these pages of the Transcript of Record in connection with other parts of the record, which we shall point out, show that the entire amount of the loans placed during that period which cover those made up to 9/30/29, in amount $58,250.00, were made entirely for the benefit of the fraudulent corporations hereinbefore described and the promotors of this fraudulent scheme. We call the court's attention to this tabulation:

Loan No. 6 Overland Hotel & Investment Company (Arizona Holding Corporation Cr.)	$30,000.00
Loans Nos. 7, 8, 9 and 10, Century Investment Trust	15,500.00
Loan No. 4, Glen O. Perkins	3,500.00
Loan No. 3, Arizona Holding Corporation	1,000.00
	50,000.00
Loans 1 and 2, Purchase of mortgages from Helen Hannon (T R 313)	5,500.00
(Used for purchase of $5,000 stock in Arizona Holding Corporation. Petitioner's Exhibit 51)	
Loan No. 5, P. S. and Frances Burgess	2,750.00

(Moneys used on purchase of $4986.93 stock of Arizona Holding Corporation).

$58,250.00

These purchases are shown in Petitioner's Exhibit 51, Certificates No. 65, 67, 70, 71, (opposite page 531 of Transcript of Record).

It will be seen that every dollar of the funds of the Security Building & Loan Association realized through the fraudulent use of the mails or otherwise, found its way into the hands of the promotors of this scheme and the corporations organized and used by them for the purpose of defrauding the public. These exhibits further show that not one of these items was a loan within the contemplation of the Bankruptcy Act. They were principally purchases of mortgages; they were not loans to members of the corporations or to any person pretending to be members thereof and the purchasers were defrauded by being given stock in fraudulent corporations, the money being procured from the Security Building and Loan Association for the purpose of purchasing said stock and the promotors thereof taking the securities and then dumping them upon the Security Building & Loan Association, Bankrupt.

Similar transactions occur all through the career of this corporation. Illustrations will be found in the Transcript of Record at pages 79, 86, 313, 319, 339, 349, 350, 531.

We will ask the court to notice the wide discrepancy

between the dates in which the bankrupt corporation started its business and the date of its making any loans.

Revealing the true character of this corporation are the dealings that took place between it and the First National Bank of Prescott, Arizona, to which reference has heretofore been made. The First National Bank of Prescott issued to the State Treasurer five certificates of deposit for $10,000.00 each on March 7, 1929. Later on September 23, 1929 and October 9, 1929, these certificates were deposited to the credit of the bankrupt corporation with the First National Bank of Prescott (T R 205), and on the same date, October 9, 1929, the individual notes of Shreve, Perkins and Cash were paid to the First National Bank of Prescott by drawing from the account of the Security Building and Loan Association $30,000.00 in the form of a check to that bank. (See insert opposite page 205 of Transcript of Record and the testimony of Mr. Miller on that and succeeding pages).

From the above it will be seen that the bankrupt never received any benefit so far as the operation of the corporation was concerned from this $30,000.00 item, the money having been paid out in payment of said notes on the same day that it was deposited with the bank.

While the capital stock of the corporation is reported at times to be $40,000.00 and at other times $45,000.00, apparently the amount actually was $40,000.00 and all purported to be paid for. $30,000.00 of the purported capital having been withdrawn in the manner above shown, we further find (T R 205 and insert) that $9,000.00 more

was withdrawn by a check to the Arizona Holding Corporation. (T R 663-664). The rest of the funds included in the $50,000.00 originally raised on these certificates was dissipated in various ways. Owing to the disappearance of the records of the corporation, it is impossible to give a detailed statement thereof. Enough is shown, however, to show that $2,500.00 thereof went to the Sunset Building and Loan Association of San Diego (Insert opposite T R 205). In all probability the balance thereof went to the Arizona Holding Corporation first and then to the Shreves and their associates. We think that this is the natural inference from all the circumstances of the case.

We think too, that the evidence as herein stated, demonstrates that the issue of the capital stock to the Arizona Holding Corporation was entirely fictitious and without consideration; that it was never paid for as it was purported to be, and that the corporation received no benefit therefrom. However, as it was sending out the circulars hereinbefore referred to, paying the commissions for the securing of "deposits", it received a large sum of money and as we have shown, this, to the extent of approximately $190,000.00 immediately went into the pockets of the promotors so that we have up to this period not a single honest transaction by the bankrupt corporation, nor one that could by any stretch of the imagination be classed as a building and loan transaction.

In the report of the Bank Examiner (T R 317) occurs the following language:

"The above loans fail to qualify in almost every

particular under Section 618, Revised Statutes of Arizona, 1928 (Section 7, House Bill 162, Seventh State Legislature).

"A careful examination of each note, mortgage, fire insurance policy and other more or less important papers relating to each loan should be made at once for the protection of the Association's interests as a corporation, rather than leaning on and entangling with the interests of a holding corporation."

Unfortunately the Banking Superintendent failed to heed the advice of his examiner. On page 325 of the Transcript of Record appears the criticisms of this same examiner made January 13, 1930, in his report to the Banking Department. He reports no evidence of appraisal in the file of many loans and none signed by more than two appraisers. The law requires three. The Articles of Incorporation state $45,000.00 capital stock subscribed and fully paid for but the records show only $40,000.00; stubs of outstanding stock certificates not receipted; interests of the Association and Holding Corporation not clearly divided and defined. Assets of the Association and all equity therein should have clear and unquestionable title; no intermingling or partial transfer of propery rights.

From the time of this report up to the time of the appointment of the State Receiver on November 16, 1931, this corporation continued its fraudulent scheme of obtaining money through the fraudulent use of the mails and other fraudulent schemes and dissipating it in the same manner as we have heretofore pointed out. How-

ever, as appears from the evidence, Mr. Button ceased to be Bank Examiner subsequent to June 30, 1930, and Mr. Ellery succeeded him in that office. Mr. Ellery's examiners discovered such a state of affairs that he immediately telegraphed on November 10, 1931 (T R 290) to John C. Hobbs, vice-president of the bankrupt corporation, as follows:

> "From receipt of this wire hold all deposits made with your company intact and do not credit on current business. Stop. Confirmation by mail.
>
> S. W. ELLERY,
> Superintendent of Banks".

and on the same date (T R 290) he wired J. H. Shreve, Palace Hotel, San Francisco, California, as follows:

> "Unless conditions with which you are familiar are remedied in your Association at close of business by Saturday 14th inst., will ask for Receiver.
>
> S. W. ELLERY,
> Superintendent of Banks"

and on the 16th inst., before the Banking Department could act, a receiver was appointed in the State Court on complaint and appearance of bankrupt corporation, all taking place in the same forenoon.

Starting on page 298 of the Transcript of Record is the examiner's report upon which Mr. Ellery notified the bankrupt that he would close it up.

The comments and criticisms of Leo N. Roach, chief

examiner, and A. G. King, examiner, appearing on pages 373 to 375, inclusive of the Transcript of Record, are revealing and show in succinct form the fraudulent character of the bankrupt corporation. We quote from the high places:

> "c—From all appearances appraisals are made to evade the law, and fit the loans, instead of requiring the loans to fit the appraisals, and conform with the law.
>
> "d—Loans 41 and 42 in the Phoenix office, aggregating $66,000.00, secured by 240 acres of land near Wellton in Yuma County are accompanied by appraisals signed by Messrs. A. C. Shreve, Glen O. Perkins, and D. H. Shreve to the effect that the land is worth $150,000.00 and the improvements consisting of two frame dwellings to be worth $9,500.00 additional. The records of Yuma County Assessor's office disclose this assessed at $2,400.00 or $10.00 per acre, and nothing for the improvements. These two loans were set up to replace other questionable assets as outlined on page 15 of this report and must be eliminated at once.
>
> e—Loan No. 24 in Tucson office carried at $15,625.-00 represents an old loan of $6,000.00 on which the Association foreclosed and received a Sheriff's certificate of title in April, 1931. The Association later paid off a second mortgage held by the Century Investment Trust for $8,500.00, together with interest and costs, making a total of $15,625.00. This is a very unusual proceedure, and the item in question must be reduced to the amount of the original first mortgage, plus accrued interest and costs.

j—The Century Investment Trust and the Arizona Holding Corporation which own all the capital stock of this Association, with the exception of the qualification stock of five directors, appear to have derived untold benefits from practically every real estate loan standing on the books, either from the transfer of mortgages, the sale of property, or by the writing of insurance."

The above report was made after a three day examination. Necessarily the examiners could only make a superficial examination.

The facts leading up to this report to the Banking Department and the subsequent action of the Superintendent of Banks in ordering Jessie H. Shreve and his associates to stop taking in money for the bankrupt was caused by the nature and conduct of the business of the bankrupt. It would make this brief too long to set up all of these transactions or point out the fraudulent nature of each. Therefore we will point out only some of the high lights showing the Court that an examination of the record will show that the transactions in general will bear out the illustrations that we give.

One of these is shown on page 339 of the Transcript of Record, Loan No. 24, dated 6/11/31. This is what is known as the Silver Slipper transaction, the Silver Slipper being a notorious night club near Tucson, and by means of this transaction which fully appears on page 339 of the Transcript of Record, it developed that the bankrupt estate was defrauded in a loan of $15,625.00 for the benefit of the Century Investment Trust. This

incidently links up the connection of Oscar H. Robson with the bankrupt and with the Century Investment Trust.

On pages 628 and 629 of the Transcript of Record appear the minutes of the special meeting of the Board of Directors of the bankrupt corporation, signed by Glen O. Perkins as secretary, in which it is stated that a proposition had been made by the Century Investment Trust that the bankrupt release as collateral to the note of $250,427.45 the following mortgages then held by the bankrupt, towit:

Loan No.	37	A. W. and Fannie York
" "	41	Lyda Dreyfus
" "	42	F. D. Arrington
" "	44	Jas. M. Shumway
" "	53	Charles J. and Lucille Pinney
" "	59	G. W. and Susan E. Shurts
" "	60	Nancy Belle Flippin
" "	67	H. W. Durham

and accept as collateral in lieu of said mortgages, real estate covered by same. These notes and mortgages represented an aggregate, including interest of $113,945.84. Deeds therefor were made to the Arizona Holding Corporation not to the bankrupt, and as a result thereof there disappeared from the assets of the bankrupt these notes and mortgages of the face value of $110,406.58 principal sum, and including interest $113,945.84. Each and all

of these loans were false and fictitious and made upon false and fictitious appraisals by the parties who had conspired to defraud the public through means of the bankrupt corporation. These notes and mortgages are fully described in the Transcript of Record at pages 349 to 359 inclusive. They include the notes of Lyda Dreyfus and F. E. Arrington amounting to $66,000.00 on the 240 acres of desert land in Yuma County of a value not to exceed $2,400.00. It includes the $9,715.00 extracted from the funds of the bankrupt corporation by means of an entirely fictitious mortgage and note and which James M. Shumway, an employee, was deceived into signing, and the money was paid out in the form of two checks to James M. Shumway which he never saw, but on which his name was endorsed, and the subsequent endorsement of the Century Investment Trust which got the benefit of this transaction.

On pages 368 and 369 of the Transcript of Record appears the statement of the Dreyfus and Arrington Transaction, and the transfer of the funds thereon to the passbook credit of the Century Investment Trust No. 5226, showing the fraudulent nature of the transaction and the disposition of the $66,000.00.

In the testimony of Mr. James A. Smith, certified public accountant (Tr. 663) this whole transaction is traced from the inception of the corporation to its closing act in the cancellation of the mortgages.

But one purpose could have animated the perpetrators of this scheme in having these mortgages released

and that was to prevent the courts from ever ascertaining the true character of the transactions, and by releasing the mortgages and accepting deeds therefor to prevent prosecutions for the wrongful embezzlement of the moneys involved.

On October 1, 1931, the bankrupt corporation transferred practically all of its assets to the Century Investment Trust, accepting a note therefor of $250,-427.45 (T. R. 629). The undoubted purpose of this note was to further cloud the record and prevent the unfortunate people who had left their money in the hands of these schemers without any recourse whatsoever. Only the bankruptcy proceedings has enabled them to save anything from the wreckage caused by these fraudulent transactions.

In the minutes of the meeting of the Board of Directors of the bankrupt shown on pages 626 and 627 of the Transcript of Record occurs the following statement:

> "The question of divorcing the activities of this association from those of the Century Investment Trust was then submitted for discussion. It was agreed that this separation of activities would benefit the Association, and upon motion duly made, seconded and carried, the following resolution was adopted:
>
> RESOLVED That in furtherance of the best interests of this Association, its activities shall be separated from those of the Century Investment Trust in the future, in so far as possible."

Having called the Court's attention to a few of the high lights of the fraudulent schemes which the bankrupt corporation was organized to further, we leave this phase of the subject.

SPECIFICATION OF ERROR NO. II.

(Assignments of Error IV and V)

The findings of fact and conclusions of law appear on pages 183 to 191 of the Transcript of Record.

No additional findings were requested and no assignment of error is made pointing out any evidence to sustain this specification or the two assignments of error IV and V.

We think that it was the duty of counsel for appellants to point out the evidence which would show that a part of the business was a building and loan business, if that is their claim. Not a single transaction of a building and loan character is pointed out in their argument under this specification. They content themselves by a long argument on matter entirely irrelevant to this assignment. The only claim they make as to the doing of any building and loan business is that they deposited certain securities with the State Banking Department as required by law for the purpose of procuring a license to organize as a building and loan association and subsequently substituted a $50,000.00 surety bond for such securities. Just what could be claimed as the doing of a building and loan association

business by bankrupt we are at a loss to understand. Confessedly there was no mutuality in the corporation. The issuance and sales of certificates of indebtedness of any nature do not constitute the doing of a building and loan business and the same was held in

Lilley Building & Loan Assn. (C. C. A. Ohio) 285 Fed. 1020, affirming 280 Fed. 143.

The issuance of these certificates and the issuance of a so-called pass book certificate for funds payable upon demand were the only methods used by this corporation to obtain funds except by giving its promissory notes to banks from whom it borrowed money, hypothecating the mortgages of the bankrupt to secure the same. The form of these certificates appear on pages 217 to 219, inclusive, and the photostatic inserts between pages 220 and 221 of the Transcript of Record. In each of these instruments there appears this clause:

> "These certificates do not make the holder a member of the Association nor subject to any liability. They are non-assessable, nonforfeitable and are guaranteed by all the assets of the Association."

It does not appear from the evidence that any money was obtained upon any form of certificate other than those containing this clause (T. R. 218). The literature sent out by the bankrupt corporation is to the same effect. All the instruments are promises to pay and all the circulars exploit the accumulating force of compound interest. Nowhere was any building and loan literature sent out. The name was used to gull the unwary.

That purchasing of mortgages is not the doing of a building and loan business is held in

First National Bank v. Dawson, 213 Pac. 1097.
and in many other cases.

The lending of money secured by mortgages at a definite rate of interest and without the borrowers subscribing for any share in the building and loan association, is not the doing of a building and loan business.

Lilley Building & Loan Association v. Miller, Supra.

The receiving of deposits on demand or upon notice is not the doing of a building and loan association business and is an ultra vires act unless specifically authorized by statute. Such depositors are creditors, not members of the Association. This is the holding in

Acklin v. People Savings Assn., 293 Fed. 393.

We believe it needs no authority to support our contention that when, as is pointed out in this brief to be the fact here, the sole purpose of the corporation was the enriching of its promoters, and, to assist in that purpose, other fraudulent corporations were organized by those same promoters, which corporations were used as vehicles for carrying out such purpose through dummy loans and fraudulent transfers, and that all its business was done as part of the scheme and to further its unholy purpose, upon no theory and under no consideration can the business done by it be classed as the doing of a building and loan business.

That the promoters of this corporation never intended to do a building and loan business or to organize as a building and loan corporation appears from the circulars which they sent through the mails and otherwise distributed for the purpose of obtaining business and which were probably the principle factors in obtaining this business. For these circulars see Petitioners' Exhibits 78, 79, 80 and 81 (T R 633-654).

In discussing this assignment of error appellants cite cases to the effect that the provisions of the Bankruptcy Act enumerating the classes of corporations subject to the Act are to be strictly construed and include only such corporations as are clearly within the provisions of the act. Assuming that this is true, it is also true that the rule laid down by the Supreme Court of the United States is that no one can claim the benefit of an exception under a statute unless he comes strictly within the exception.

United States v. Dickson, et al., 10 Law Ed 689; **15** Peters **141.**

Appellants' counsel do not seem very confident that the bankrupt is or was a building and loan association for They ask this Court to hold it to be a banking corporation if it does not find that it is a building and loan association. They do this despite the fact that every banking transaction, if it did any, would be ultra vires, and that no claim to the exception under the statute could be based upon an ultra vires transaction.

"Where the enacting clause is general in its

language and objects and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof."

United States v. Dickson, supra.

"It is evident that appellee was organized to do a general savings and loan business, something less than either a bank or a building and loan association. If it occasionally engaged in banking transactions those acts were ultra vires and could not operate to make it a bank within the meaning of the bankruptcy law."

Clemons v. Liberty Savings & Real Estate Corp.
61 Fed (2) 448, (5th C. C. A.).

As the bankrupt corporation did not raise or obtain any money by the issuing of building and loan stock and as all the instruments under which it raised money expressly declare that the holders of such interest are not members of the corporation, it is very clear that it did not do any building and loan business so far as its receipts are concerned.

We now consider the other side of the picture, namely, the methods in which it invested its funds. As the Association by its Articles of Incorporation was precluded from issuing any membership stock or any building and loan stock, it necessarily follows that it could not do

a building and loan business so far as its investments and loans were concerned. The holding corporation was not qualified to be a member.

Morawetz on Private Corporations, Sections 431-433.

People ex rel Peabody v Chicago Gas & Trust Co. 130 Ill. 268.

Standard Savings & Loan Association v. Aldrich 163 Fed. 216 (6th C. C. A.).

Handelsman v Chicago Fuel Co. 6 Fed (2nd) 163.

Endlich, Building Associations 2nd Ed. 323.

Furthermore it does not appear that the corporation made any loans upon building and loan principles during its career.

Counsel for appellant seek to sustain their contention that the bankrupt is a building and loan association upon the theory that it is recognized as such by State Officials. We cannot see as a matter of reason that the fact that the promotors of a fraudulent scheme were able to deceive the officials of the Executive Department of the State, would be any res adjudicata of the proposition that they were not a building and loan association. Their contention merely is that the finding of a member of the Executive Department on an ex parte hearing is res adjudicata of the proposition and binding upon the Courts. The Supreme Court of the United States speaking through four different Chief Justices has answered that contention in the following cases:—

Chief Justice Hughes in Crowell v. Nelson, 76 Law Ed. 598; 285 U. S. 22-95.

Chief Justice Taney in Decatur v. Paulding, 10 Law Ed. 559, 14 Peters 497:

Chief Justice White in Kealoha v. Castle, Trustee, 52 Law Ed. 998; 210 U. S. 149-155.

The same was held by Chief Justice Marshall in an earlier case.

Counsel rely strongly upon the case of In re Humphrey Advertising Co., 177 Fed. 187. This decision was rendered under the old law when the principal business of the bankrupt determined its character. It has never since been recognized as the law and the Supreme Court of the United States distinctly laid down the contrary doctrine in a case decided by it some four or five days after that decision.

Toxaway Hotel Co. vs. Smathers & Co., 54 Law Ed. 558; 216 U. S. 439.

wherein the Court says:

> "Amenability to the statute must turn upon the facts of the case where, as here, the same corporation was engaged in "mercantile pursuits" in addition to inn keeping. There is no way to settle whether it was "engaged principally" in the one or the other but by comparison of the two. When we do this it is easy to see that the mercantile business which it did was of minor character, and was largely an incident to the location of the hotels of the company in a thinly settled mountainous region."

The Articles of Incorporation show that the bankrupt lacks the essential and fundamental characteristics of a building and loan association.

While we know of no case holding that the mere filing of Articles of Incorporation not followed by the user of the privileges set forth therein bring a corporation within any of the exceptions to adjudication under the Bankruptcy Act, we are firmly of the opinion that the Articles of Incorporation themselves show that the bankrupt is not a building and loan association within the meaning of either the statutes of Arizona or the common law of building and loan associations. Such associations are distinguished from ordinary corporations by having a form of stock that is payable on installments as distinguished from a form of stock that is paid-up capital from the start. This is an essential feature.

Wilkinson v. Mutual Bldg & Loan Assn., 13 Fed (2nd) 997.

Mutual Loan Association v Tyre, 81 Atl. 48.

Albany Mutual Bldg. & Loan Assn. v. City of Laramie, 65 Pac. 1011.

Towle v. American Building, Loan & Inv. Society, 60 Fed. 131.

In the case of Wilkinson v. Mutual Bldg. & Loan Assn. supra, the court says:

"What is the instrument in question?

We must take judicial notice of the Wisconsin law relating to building and loan associations. It is a

matter of common knowledge that as to such associations there are certain fundamentals: (a) That their purpose always has been to enable persons of moderate means, by small monthly contributions, to become home builders, and owners; (b) except occasional borrowings to cover emergencies, they borrow no money and have no business other than the accumulation of money from the sale of their shares, usually on monthly payments, to their members, and the lending of that money to their members, who wish to buy or build homes, so that the sole profit comes from the use by the borrowing members, of the money paid in by all the members on their respective shares of stock."

The alleged bankrupt could not have under its Articles of Incorporation any members for the reason that the Articles provide that its entire authorized capital shall consist of the ordinary stock of a corporation incorporated under the general law. For that reason the necessary mutuality does not exist to constitute a building and loan association.

Revised Code of Arizona, 1928, Sec. 612, Session Laws of Arizona 1925, Sec. 1, Chapt. 76.

Wilkinson v. Mutual Bldg. & Loan Assn., 13 Fed. (2nd) 997.

Western Bond & Mortgage Co. v. Crews, 231 Pac. 138.

Exhibits 10 to 23, inclusive (T. R. 212-221) show that the promotors of this corporation did not consider it a building and loan association or that it should have

members. The by-laws of the corporation also show a like intention, Article IX, Section 3, reading:

> "Holders of any of the forms of investment certificates above designated are not members of the corporation and have none of the rights, powers and liabilities incident thereto." (T. R. 72).

The bankrupt did not derive any money from the sale of building and loan stock. Consequently it could not comply with the provisions of the statutes under which it was incorporated nor with the general law of building and loan associations.

> *Western Bond & Mortgage Co. v. Crews,* 231 Pac. 138.

The Statutes of Arizona, Section 615, Revised Code of Arizona, 1928, provide that the government of a building and loan association shall be vested in its members. The Articles of Incorporation preclude this. See Article II, Section 2, of bankrupt's By-laws reading as follows:

> "The majority of the Board of Directors shall always be selected from those holding ten or more shares of the capital stock and the minority may be selected from holders of membership shares." (T. R. 63).

As the Articles made it impossible for the corporation to issue membership shares and as it actually did not issue any, it is clear that it was impossible for the bankrupt to be a building and loan association under Section 615 of the Revised Code of Arizona, 1928. As the statutes of

Arizona are practically the same as the common law of building and loan associations, it could not in any event be a building and loan corporation. As the only holder of any stock in this corporation was the Arizona Holding Corporation, a corporation, and as it was incapable of becoming a member of the association, this so-called building and loan association was without any members.

Morawetz on Private Corporations, Sections 431-433.

People ex rel Peabody v. Chicago Gas & Trust Co., 130 Ill. 268.

Standard Savings & Loan Assn. v. Aldrich, 163 Fed. 216 (6th C. C. A.).

Handlesman v. Chicago Fuel Co., 6 Fed. (2nd) 163.

Endlich, Building Associations, 2nd Ed. 323.

No presumption arises from the use of the name, Building and Loan Association. Calling a thing by one name when its organization and characteristics are something entirely different, does not make it the thing named.

Rhodes v. Missouri Savings & Loan Co., 173, Ill. 621.

Meroney v. Atlanta National Bldg. & Loan Assn., 116 N. C. 882, 47 A. S. R. 841.

Lilley Building & Loan Assn., 280 Fed. 143.

United States v. Freed, 179, Fed. 236.

Homebuilding & Savings Co., 12, B. T. A. 289.

Acklin v. Peoples Savings Bank, 293 Fed. 393.

The name of the corporation so organized is not ma-

terial if it has the purposes and characteristics named in the statute and its constitution.

Cramer v. Ohio L. & T. Co., 69 L. R. A. 415.

"The fact that a corporation calls itself a building and loan association * * * is not determinative of its true character, if the mutuality requisite to a building and loan association is lacking."

Home Building and Savings Co., 12 B. T. A. 289.

BADGES OF FRAUD AND PRESUMPTIONS THEREFROM

The proofs of fraudulent transactions introduced at the hearing before the Trial Judge and set up in the Transcript of Record are so numerous as to become conclusive, and in any event shift the burden of proof to the bankrupt to establish by clear and conclusive evidence that its transactions were fair and honest, and that its assumption of the name of a building and loan association was not fraudulent and not intended to deceive the unwary; that there was no fraud in its inception; and that it was honestly doing a building and loan business for the benefit of its members; that it was composed of members governed by members for the benefit of members.

Wait on Fraudulent Conveyances Section 225.

Toone v. Walker, 243 Pac. 147.

As the transactions between the interlocking direc-

torates of the corporations are presumptively fraudulent and as the evidence shows that these were actually fraudulent, the bankrupt can claim the benefit of no exception under the Bankruptcy Act.

Steinfeld v. Copper State Mining Co., 37 Ariz. 151, 290 Pac. 155.

Garden Development Co. v. Warren Ranch, 35 Ariz. 254, 276 Pac. 839.

As there was no user of any privilege of a building and loan association claimed for it under its Articles of Incorporation, the bankrupt is not a building and loan association.

Elgin National Watch Co. v. Loveland, 132 Fed. 41.

NATURE OF BUSINESS DONE AT TIME OF THE COMMISSION OF THE ACT OF BANKRUPTCY GOVERNS.

This corporation a month prior to the commission of the Act of Bankruptcy upon which it was adjudicated a bankrupt conveyed all of its property to another corporation (T. R. 628-629) and thereby abandoned all pretense of doing a building and loan business. It then stood revealed as a fraudulent monied corporation not coming within the exceptions of the Bankruptcy Act.

> "In view of the evidence, we are impelled to the conclusion that at the *time of the commission of the alleged act of bankruptcy* appellant was chiefly engaged in farming, and, such being the case, we are

of the opinion that the lower court was in error in adjudging appellant to be a bankrupt." (Italics ours).

Counts v. Columbus Buggy Co., 210 Fed. 748 (4th C. C. A.).

To the same effect are:

Flickinger v. First Nat. Bank, 145 Fed. 162 (C. C. A. 6th).

In re Inman, 57 Fed. (2) 595.

From the above it will be seen that the date of the commission of the act of bankruptcy determines the right of the bankrupt to claim an exception to the adjudication. In the instant case a month prior to the appointment of the State Receiver the bankrupt had abandoned all pretense of doing a building and loan business and transferred all of its assets except furniture, to the Century Investment Trust.

SPECIFICATION OF ERROR NO. IV.

Under this specification counsel for appellants assert that the Court had no jurisdiction to adjudge the appellant a bankrupt. This is based upon the theory that the District Court had no power to allow the amendment of the involuntary petition in bankruptcy and for that reason the case should be dismissed.

In support of this contention counsel cites two cases. The case of Norris v. Crocker, 14 Law Ed. 210, 13 How. 429, merely holds that where an action for the recovery

of a penalty prescribed in the Act of 1793 was pending at the time of the repeal, such repeal is a bar to the action. No question arose as to an amended complaint and in the nature of that case no amended complaint could have been filed that would have retained the jurisdiction in the court.

The case of Merchants Insurance Co. v. Ritchie, 18 Law Ed. 540, 72 U. S. 541, is merely to the effect that when the jurisdiction of a cause depends upon statute, the repeal of the statute takes away the jurisdiction. No question of the amendment of the complaint setting up facts existing at the time that the petition was filed was involved:

Also the Supreme Court of the United States has ruled upon the question in a clear cut decision where the sole questions involved were the amendment of an involuntary petition in bankruptcy to state jurisdictional facts not stated in the original petitions and relating to exceptions in the Bankruptcy Act and the method of raising objections on appeal. In the case of

Armstrong v. Fernandez, 52 Law Ed. 514; 208 U. S. 324-332

it was held that petitioning creditors had the right to amend a petition so as to aver that the bankrupt "is not a wage earner, nor a person engaged chiefly in farming or the tillage of the soil, and who is chiefly engaged in commercial business." The District Court made findings of fact and conclusions of law under General Order

36. The District Court gave the petitioning creditors leave to amend their petition and set up the jurisdictional facts as they actually existed. The Supreme Court speaking through the Chief Justice said:

> "The errors assigned in reference to the action of the Referee and of the Court in permitting amendments of the verification and other amendments, we regard as without merit. The power of a Court of Bankruptcy over amendments is undoubted and rests in the sound discretion of the Court. We think that there was no abuse of discretion here and the Court was fully justified in its order in reference to the amendments."

The other question involved in that case was raised by an assignment of error very similar to the one that is filed in this case. The appellants had appealed from the order of adjudication on the ground that "there is neither fact nor evidence that the alleged bankrupt had committed either the act of bankruptcy alleged, or any act of bankruptcy whatever." The Chief Justice in his opinion says with reference to this point:

> "From that order of adjudication this appeal was prayed but it nowhere appears that Armstrong and others objected to the want of proof of the acts of bankruptcy or asked any findings in respect thereto, or objected to the findings that were made for deficiencies in that regard. In other words Armstrong and others permitted findings to be made as they were and now say that other findings should have been made in relation to proof of acts of bankruptcy without having objected that they were not made, or

> that the findings as made were on that account fatal to the judgment. The presumption is that if such a suggestion had been made to the court the alleged deficiencies, if really existing, could have been supplied and would have been supplied."

The Chief Justice further along in the opinion states:

> "It seems clear that the acts of bankruptcy had been previously determined as committed, and that the case was only contested on the other point and hence that this contention is an afterthought which ought not to be entertained, let alone that from the findings that were made it is obvious enough that Alvarado was in liquidation and might properly be adjudged a bankrupt."

The decree was affirmed. We submit that the above cited case is conclusive in this matter. As in that case it appears that "from the findings that were made it is obvious enough that * * * might properly be adjudged a bankrupt", we see no necessity under this holding for the Court to go beyond the finding of that of the Trial Judge. It cannot be urged that this Court should go into the matter because it is a jurisdictional question, for it was a jurisdictional question in that case the same as it is in this; yet the Court held that the findings of fact were conclusive.

Other cases holding that an involuntary petition may be amended to correct errors in the statement of jurisdictional facts in the original petition are:

> *Gleason v. Smith,* 145 Fed. 605 (C. C. A. Pa.).

State Bank v. Haswell, 174 Fed. 209 (C. C A. Iowa).

Massagli v. Butler Co. (9th C. C. A.) 16 A. B. R. (NS) 10, 39 Fed. (2) 346.

Millan v Exchange Bank (C. C. A) 183 Fed. 753.

International Silver Co. v. N. Y. Jewelry Co., (C. C. A. 6th) 233 Fed. 945.

Morrison v. Rieman (7th C. C. A.) 249 Fed. 97.

In re Cleveland Discount Co., 5 Fed. (2) 846 at p 858.

Mr. Graham Foster (now deceased), the attorney for the intervening petitioning creditors, on February 19, 1932, filed his verified petition for leave to amend the involuntary petition theretofore filed by him. (T. R. 46-47). In this he stated the facts to be "that your petitioners were misled by the name of said alleged bankrupt and by information received from various sources into believing that said alleged bankrupt was a building and loan association and was transacting business as a building and loan association and so alleged in their said petition. That since the filing of said petition, petitioners have learned from an examination of the officers of said alleged bankrupt and from other sources that said alleged bankrupt is not a building and loan association and was not engaged in building and loan association business", and prayed for leave to amend and file an amended involuntary petition, and on the same day the court made the order allowing the amendment of the petition (T. R. 48).

The court ,of course, had ample power to allow the

amendment. The petition set up adequate reasons why the petitioners should be allowed to amend. The subsequent evidence in the case demonstrates that the amendment was based upon facts existing at the time the original petition was filed but that had been fraudulently concealed from the petitioners and the public generally. No error has been predicated upon the allowance of this amendment by the District Court. We submit that it is not a question properly to be raised upon this appeal.

SUMMARY

It is apparent from the facts and evidence in the Transcript of Record, and which we have endeavored to point out in this brief, that the bankrupt corporation is merely:

1) A corporation organized to defraud the public by violation of the criminal laws of the State and Nation;

2) That at its best it is a mere loan company without any of the features of a building and loan association and incapable of doing the business of one;

3) That it never did any building and loan business of any nature;

4) That it was confessedly fraudulent in its conception and operation;

5) That it obtained a license as a building and loan association by fraudulent deception of state officials;

6) That upon the hearing on adjudication it failed to disclose to the court the actual situation and condition of the corporation.

IN CONCLUSION

NO CREDITOR INTERVENED TO OPPOSE THE ADJUDICATION:

It is significant that no creditor of the corporation ever intervened to oppose the adjudication in this matter or to maintain this appeal, and the bankrupt being confessedly insolvent and the assets not reverting to it under any circumstances, and as the corporation has no funds other than concealed assets out of which this expensive appeal could be maintained, it is apparent that the purpose thereof is to permit a tricky and dishonest creditor to escape the provisions of the Act and to enable its dishonest directors and officers to escape their just punishment.

> "This Act must be construed * * * to avoid an interpretation, unless the same be compelled by the language of the statute, which permits a dishonest or tricky debtor to escape its provisions."
>
> *Hills v. F. D. McKiness Co.*, 26 A. B. R. 329; 188 Fed. 1012.

It is also significant that in the face of all the fraud proved in the trial court, with serious charges involved against the honesty and integrity of the officers and directors of the bankrupt corporation, that not one of these

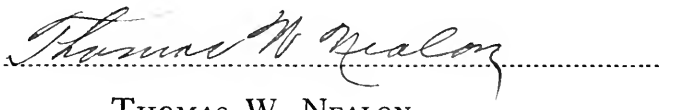
officers or directors was put upon the stand to refute the evidence that was adduced by the petitioning creditors and that no disclosure was made by them of the conduct of its affairs. This is conduct that no honest or upright person would permit to go uncontradicted into the record of a case in which he was a party or in which his honor was involved.

Upon all the record in the case, these appellees respectfully submit that the decree of the District Court adjudicating Security Building and Loan Association, a corporation, a bankrupt should be affirmed.

Respectfully submitted,

ALICE M. BIRDSALL,

Counsel for Mary Rose, Ray L. Rose, Joe Ramos, Lillian M. Erwin, Luther M. Frink, E. Dale Frink, John H. Digges, Billie Lieber, Hattie M. Lieber, Hattie Schneider Lieber, Henry F. Lieber, Henry Lieber, Jr., Herman Lieber, Intervening Creditors, Appellees.



THOMAS W. NEALON,

Counsel for R. E. L. Shepherd, Receiver in Bankruptcy, Appellee.

No. 7099

IN THE

United States Circuit Court of Appeals

FOR THE

Ninth Circuit

SECURITY BUILDING & LOAN ASSOCIATION, a Corporation, and BEN H. DODT, Receiver of Security Building & Loan Association, a Corporation,

Appellants,

vs.

JOHN H. SPURLOCK, TED DEMPSEY, W. N. SELMAN, MARY ROSE, RAY L. ROSE, JOE RAMOS, LILLIAN M. ERWIN, LUTHER M. FRINK, E. DALE FRINK, JOHN H. DIGGES, BILLIE LIEBER, HATTIE M. LIEBER, HATTIE SCHNEIDER LIEBER, HENRY F. LIEBER, HENRY LIEBER, JR., HERMAN LIEBER, and R. E. L. SHEPHERD, Receiver in Bankruptcy,

Appellees.

PETITION OF APPELLEES, MARY ROSE, RAY L. ROSE, JOE RAMOS, LILLIAN M. ERWIN, LUTHER M. FRINK, E. DALE FRINK, JOHN H. DIGGES, and R. E. L. SHEPHERD, Receiver in Bankruptcy, for Rehearing.

ALICE M. BIRDSALL,
THOMAS W. NEALON,
Counsel for Petitioning Appellees.

CASES CITED

CASES CITED (Cont.)

No. 7099

IN THE

United States Circuit Court of Appeals

FOR THE

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Appellees.

APPELLEES' PETITION FOR REHEARING

Come now Mary Rose, Ray L. Rose, Joe Ramos, Lillian M. Erwin, Luther M. Frink, E. Dale Frink, John H. Digges, and R. E. L. Shepherd, Receiver in Bankruptcy, Appellees in the above styled and numbered cause in which, on the 6th day of June, 1933, this Court rendered

its decree reversing the order of the District Court of the United States in and for the District of Arizona, which decree of the said District Court of Arizona adjudicated the Security Building and Loan Association a bankrupt, and within the time for filing a petition for rehearing these petitioners file this, their petition for such rehearing and for grounds thereof respectfully represent:

FIRST

That the Court erred in not granting Appellees' Motion to Dismiss the appeal upon the grounds set up in said Motion of Appellees to Dismiss said Appeal, and particularly upon the ground that the Trustee in Bankruptcy was a necessary and indispensable party to said appeal, no supersedeas having been filed on appeal from the Decree of Adjudication, and not having been made a party, and no severance having been sought or granted, this Court was without jurisdiction to hear said appeal for lack of necessary parties.

AUTHORITIES:

Davis v. Mercantile Trust Co., 152 U. S. 590, 38 L. Ed. 563, 14 Sup. Ct. Rep. 693;

Wilson v. Kiesel, 164 U. S. 248, 41 L. Ed. 422, 17 Sup. Ct. Rep. 124.

SECOND

That the Court erred in holding that the Security Building and Loan Association was

(1) A building and loan association de jure within the meaning of the laws of Arizona; and

(2) That it was so declared to be by the appropriate officers of the state,
for the following reasons:

(1) That a de jure corporation being defined as one which is invulnerable in quo warranto proceedings instituted by the state, and to constitute which every substantial requirement of the law under which it is incorporated must be complied with, it follows that a de jure building and loan association within the meaning of the laws of Arizona must be one so organized under the laws of Arizona as to be invulnerable in quo warranto proceedings brought by the state, and to be shown to have complied with every substantial requirement of Article 4, Chapter 14, Revised Code of Arizona 1928.

The organization of the Security Building and Loan Association as a building and loan association was fatally defective in the following particulars:

(a) Section 613 (Article 4, Chapter 14) Revised Code of Arizona 1928, provides the manner in which a building and loan association may be incorporated in Arizona, providing it shall make and file articles as for private corporations, and sets forth that such articles *shall* include (among other things) "the amount of the par value and the kinds of stock that the association *will* issue".

The kind of stock provided for in the Articles of Incorporation of the Security Building and Loan Associa-

tion does not come within the definition of building and loan stock as prescribed by Sections 612 and 618 of said Revised Code, in that the articles provide only for the stock of a non-mutual corporation and expressly forbid loans thereon or withdrawals thereon or the pledging thereof as security for the loan, thereby precluding the doing of a building and loan business in the manner provided for in Sections 612 and 618. It is axiomatic that under the provisions of Section 613 aforesaid all stock issues must come within the capital authorized in order to comply with the provisions of the general incorporating law, to-wit, Section 587, Subdivision 3, of the Revised Code of 1928. The provision in Article 6 of the By-Laws that "additional working capital may be accumulated by the issuance of membership shares, units and certificates, both installment and fully paid, as provided for in Chapter 76, Arizona Session Laws 1925, and the By-Laws of this corporation" is rendered inoperative and ineffective by reason of the fact that the authorized capital stock has been previously fixed in said Article 6 at fifty thousand shares of a par value of One Hundred Dollars, and the stock classified therein limits both the amount and kind of stock. There is no provision in the statutes of Arizona for the issuance of "units and certificates" and therefore that right cannot be created by incorporating the same into either the Articles or By-Laws of the association. The powers of the association could not exceed those enumerated in its Articles of Incorporation, and only those so enumerated as are warranted by the statutes in question; the Articles here not providing for such stock as is recognized as mutual building and loan stock, and

the authorized capital stock being limited to a particular stock, no recitals in the By-Laws can cure this defect in the Articles of Incorporation. It follows that the association cannot be a building and loan association de jure under the laws of Arizona.

(b) The permit to carry on the business of a building and loan association required by Section 614 (Article 4, Chapter 14) Revised Code of Arizona 1928, was never issued to such association prior to the completion of its organization, or at all, and consequently the requirement that such permit must be issued and recorded in the office of the recorder of the county of its principal place of business was not complied with, and the record conclusively shows that no such permit was ever issued or recorded. This is a "substantial requirement" of the law as it is a condition precedent to the doing of business. The *licenses* set up in the record as having been issued to this association by the Superintendent of Banks for periods of one year each and for which a fee of Five Dollars per year are charged have no connection with the requirements of Section 614. They are issued under the provisions of Section 220, Chapter 8, Revised Code of Arizona 1928, and are nowhere required to be recorded, nor were they in fact recorded in any county, or at all. The omission to comply with this statutory requirement was fatal to the organization of a building and loan association de jure.

(c) The By-Laws of the association were not adopted *nor recorded* in conformity with the requirements of Section 616 (Article 4, Chapter 14) Revised

Code of Arizona 1928, and do not fulfill the requirements of the provisions thereof in many respects, but notably in that nowhere do they provide for the *charges of management,* and for the periodical investigation of the business and condition of such association. The requirements of the statute with regard to the provisions to be contained in the By-Laws are fundamental and the compliance with same and with the requirement that they be recorded in the office of the county recorder where the principal office of the association is located is a condition precedent to the completion of the organization as a building and loan association, since the general incorporating law contains no such requirements with respect to private corporations. The purpose of the legislature in requiring the recording both of a *permit* from the Superintendent of Banks and of By-Laws in which all the essential features of the business structure under which an association proposes to operate are set forth is obvious, and these requirements for the benefit and protection of the public in giving notice to prospective investors and borrowers of the nature and set-up of the organization cannot be dispensed with.

Since the record conclusively shows that the By-Laws were never recorded, as well as showing the omission therefrom of statutory requirements, no building and loan association de jure could have existed.

(d) The requirement of Section 628 (Article 4, Chapter 14) Revised Code of Arizona 1928, with respect to the deposit of securities with the State Treasurer, reading as follows:

> "Before the superintendent of banks shall issue a permit to do business to any building and loan association, such association shall deposit with the state treasurer *securities of the character authorized for the investment of the funds of the association to the amount of fifty thousand dollars,* to be held in trust for the benefit of the stockholders or members of said association; or in lieu of the deposit of such securities, or part thereof, a bond in the amount of fifty thousand dollars, of a surety company qualified to do business within the state, etc."

was not complied with for the reason that the record shows that the attempted compliance with this requirement on the part of the association was the deposit of certificates of deposit of an aggregate value of Fifty Thousand Dollars on March 7th, 1929, and a (subsequent) deposit of four notes and mortgages in the aggregate sum of Ten Thousand Dollars. The character of the securities authorized for the investment of the funds of the association is specified in Section 618 of the Code, and includes (in addition to *loans* by notes secured by first mortgage on real property, or real property to be improved under contract with the association and on shares of the association to the amount of ninety per cent of their withdrawal value) ONLY the following: "Bonds of the United States, the state of Arizona, counties, school districts and other municipalities, and of improvement districts in said state". Clearly, therefore, the certificates of deposit were not a deposit in compliance with the statute, since they were not securities authorized by the

clear language of the statute, and since the deposit of securities of the character authorized by the statute was a condition precedent to the issuance of a permit to do business to the association by the superintendent of banks, it follows that this very "substantial requirement" of the statute necessary to perfect an organization de jure was not complied with. The approval or non-approval of these securities by the bank examiner could carry no weight as the statute does not permit or authorize him to approve such securities, but *only the bond* which may be substituted in lieu thereof; neither is he vested with any discretion to vary the terms of the plain letter of the statute as to the character of these securities. And if it be contended that the defect was cured by the substitution on October 9, 1929, of a bond in the sum of Fifty Thousand Dollars, it could scarcely be urged that the condition precedent was complied with, since the Certificate of Incorporation was issued to the association (by the Arizona Corporation Commission under the general laws of Arizona) on September 5, 1929, thus precluding the organization of a de jure building and loan association.

(e) The right to do a building and loan business was a special or secondary franchise independent of the formation of a corporation. This, being a special or secondary franchise, does not vest until there has been bona fide acceptance by actual user thereof. The evidence in this case conclusively shows non-user as well as mis-user of this franchise in that no building and loan business was ever done. It is the rule that for non-user or mis-user, quo warranto proceedings by the State will lie, and for

this reason the Security Building and Loan Association could not be a building and loan association de jure within the accepted meaning and definition of a de jure organization.

(2) There is no provision in the statutes of Arizona authorizing any particular officer of the state to pass upon or declare any organization or corporation to be a building and loan association, and in the absence of an express statute any certificate of any officer to that effect would be wholly without force or weight. However, the record shows no declaration by any officer to that effect.

The Superintendent of Banks by Section 614 only passes upon the question of whether the incorporators are financially responsible and there is need in the community for the organization of a building and loan association. On this one point his decision is not subject to appeal, and he may thereupon (if satisfied) "issue a permit" to carry on the business of a building and loan association. Since this is before the completion of the organization, certainly this language could not be construed to mean that the issuance of such permit is a "declaration" that any organization not yet completed is a building and loan association. Furthermore, as pointed out above, this permit was *never issued* and therefore could never have been recorded in compliance with the statute.

Certainly there is no "declaration" or even implication by the Certificate of Incorporation issued to this Association by the Corporation Commission that this asassociation is a building and loan association. The re-

cord shows the Certificate to be a certificate reciting the qualification of the Security Building and Loan Association *as a private corporation under the general laws of Arizona,* and this certificate was not issued until September 5, 1929, which was many months after the purported organization of the building and loan association. But, in any event, the recognition of the corporation as a building and loan association by the Superintendent of Banks or the Corporation Commission or any other officer, *unless authorized by law so to do,* would be of no effect and could in no way cure the defects in its organization. Nowhere in the statute can be found any authority granted to any officer of the state to pass upon or certify the sufficiency or validity of the organization as a building and loan association.

AUTHORITIES

(1.) That a corporation de jure is one invulnerable even in direct proceedings brought against it by the state:

7 *R. C. L., Sec.* 42, page 60; sec. 45 page 64;

14 *C. J., Sec.* 215, page 204;

Kosman v. Thompson, Judge (Iowa), 215 N. W. 261;

Capps v. Hasting's Prospecting Co., 40 Neb. 470, 58 N. W. 956, 42 A. S. R. 677, 24 L. R. A. 259;

Alderslope Ditch Co. v. Moonshine Ditch Co., 176 Pac. 593;

In quo warranto proceedings by state on right of

corporations to exercise corporate powers, corporation must show existence de jure and therefore a *substantial* compliance with *all* the conditions precedent to legal incorporation prescribed by statute.

14 *C. J., Sec.* 281, page 251.

Fletcher Cyc. Corp., Vol. 1, Sec. 182

Bank of Midland et al. v. Harris, 114 Ark. 344, 177 S. W. 67, Ann. Cas. 1916B 1255.

Whether the things done in and about the organization, when done, constitute a legal corporation is a question of law.

Fletcher Cyc. Corp., Vol. 1, Sec. 182

As to what is substantial compliance with statutory requirements.

People v. Golden Gate Lodge No. 6 *B.* & *P. O. of Elks,* (*Cal.*) 60 Pac. 865.

Bank of Midland v. Harris, 114 Ark. 344, 170 S. W. 67, Ann. Cas. 1916B, 1255.

The By-Laws of a corporation cannot aid or enlarge the limitations of the Articles, especially in regard to the capital stock.

Chicago City Ry. Co. v. Allerton, 85 U. S. (18 Wall. 233), 21 L. Ed. 902,

wherein it is said:

"A corporation * * * is an association of natural persons who contribute a joint capital for a common purpose and although the shares may be assigned to new individuals in perpetual succession, yet the number of shares and amount of capital cannot be increased, except in the manner expressly authorized by the charter or articles of association. * * * Changes in the purpose and object of an association or in the extent of its constituency or membership, involving the amount of its capital stock, are necessarily fundamental in their character and cannot on general principles be made without the express or implied consent of the members."

Failure to file articles with county clerk fatal to corporation de jure.

Martin v. Dietz, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151.

And where Illinois statute required that as part of proceedings for incorporation a report setting up various matters relating to stock subscriptions, et cetera, should be filed with the Secretary of State, who thereupon should issue a certificate of complete organization of the corporation, the failure to record such certificate of the Secretary of State was held to be fatal defect.

M. H. Vestal Co. v. Robertson, 277 Ill. 425, 115 N. E. 629.

It must be borne in mind that the Arizona statute not only requires a permit to do business as a building

and loan association to be issued by the Superintendent of Banks prior to the completion of the organization, and recorded in the office of the recorder of the county where the principal business is located, but also requires the By-Laws to be recorded, and that the Security Building and Loan Association failed to comply with either of these requirements.

That corporate existence can be questioned in quo warranto proceedings for non-user and mis-user of franchise.

Cook on Corporations, 7th Ed., Vol. 2, Sec. 634, page 1941;

22 R. C. L., Sec. 11, Page 672, et seq.;

Chicago Life Ins. Co. v. Needles, 113 U. S. 574, 28 L. Ed. 1084;

People ex rel Attorney General v. Dashaway Association, 84 Cal. 114, 12 L. R. A. 117;

Woods v. Lawrence 66 U. S. (1 Black. 386) 17 L. Ed. 122.

(2) The certificate of an officer of the State is not evidence of corporate existence unless made so by statute.

"Unless the governing statute empowers the particular officer of the State to determine that the provisions of the law have been complied with, his certificate to that effect is not evidence of the fact, but it must otherwise appear."

14*C. J. Sec.* 174, page 172;

In *Boyce v. Towsonton Station M. E. Church,* 46 Md. 359, where the law provided that in incorporating religious societies, churches, etc., an agreement should be signed and acknowledged by trustees before two Justices of the Peace or before Judge Circuit Court, etc., and which should be certified by the said Justices or Judge *according to directions of section,* it was held that no authority having been given to the Judge to determine that the provisions of law have been complied with, his certificate to that effect is not evidence of the fact and the court refused to admit it in evidence.

"An ex parte certificate or statement by a public officer is not evidence of the facts stated unless made so by law."

Farmers' State Bank v. Brown, 204 N. W. 673.

That officer empowered by statute to issue license to do business for current year and collect fee therefor, acts in ministerial capacity and has no power to pass upon legality of organization, See

Westlake Park Inv. Co. v. Jordan (*Cal*), 246 Pac. 807.

THIRD

That the Court erred in holding that the Security Building and Loan Association comes within the excep-

tion of the Bankruptcy Act adopted in February, 1932, for the reason that the evidence conclusively showed that it not only had failed to organize as a building and loan association under the definition thereof prescribed in the Arizona statute, but that no building and loan business was ever transacted by it, and under such construction of the exception, it would inevitably follow that in order to evade the provisions of the Bankruptcy Law, it will only be necessary for promoters of a corporation to set up in their Articles of Incorporation that they propose to do the business of a building and loan association and secure a license by paying the fee therefor and thereafter engage in any other business—mercantile, trade, or even gambling—and yet claim exemption from the penalties and liabilities under the Bankruptcy Act by merely setting up that they are *chartered* to do a building and loan business. This construction of the Act will open the way to all kinds of fraud, and we believe is not in accord with the universal application of the principal that it is the business actually done that controls the exemption from the Bankruptcy Law and not what a corporation may be empowered to do. No case has been cited, nor, so far as we can discover, can be cited to the contrary. The Clemons case is not in point, because the question there determined was whether the corporation could claim exemption through its ultra vires acts.

Furthermore, such construction precludes a uniform interpretation of the meaning of the words in the exception (Amendment of February, 1932) and would result in confusion in determining what organizations may

come within this exemption in the law, in the different states, the District of Columbia, and each of the various territories.

AUTHORITIES

That the business actually engaged in by those claiming the benefits of the exemptions to the provisions of the bankruptcy act controls, and this is true of corporations as well as individuals and other companies.

> "The liability of a person whether natural or artificial to bankruptcy is to be judged by the character of the pursuit in which such person was engaged at the time the debts due the petitioning creditors were incurred, with respect to which it may be conceded that as to a corporation its actual business is to be considered and not that which it might possibly have undertaken by virtue of authorized but unexercised powers.

Tiffany v. La Plume, 141 Fed. 444, 448.

> "It is the actual occupation of the corporation not its charter purposes that governs where there is a conflict as to occupations, though of course the charter provisions may be looked to as an aid to the determination".

Remington on Bankruptcy, Third Ed., Vol. 1, Sec. 92.

In re Supreme Lodge of Masons Annuity, 286 Fed. 180;

In re Jutte Co., 266 Fed. 357;

Friday v. Hall & Kaul Co., 216 U. S. 449, 54 L. Ed. 562;

Toxaway Hotel Co. v. Smathers & Co., 216 U. S. 439, 54 L. Ed. 558.

In the latter case it is said:

> "Liability under the act is dependent upon what it was actually doing rather than upon what it was organized to do or professed to be doing."

While it is true these decisions were rendered under the law prior to 1910, and deal with corporations "principally engaged" in certain business, they are none the less in point as showing that charter provisions and authority thereunder have not been held determinative of the business when exemptions are claimed under the act.

And by analogy, the following cases holding that charter provisions fixing the principal place of business do not control are submitted as being in point:

Guanacevi v. Tunnel Co., 201 Fed. 316;

Home Powder Co. v. Geis, 123 C. C. A. 94, 204 Fed. 586.

Also analagous as showing the application of the principle that the business engaged in, not the provisions of its charter, controls in fixing the character of a public utility corporation, are the following decisions of the Supreme Court of the United States:

U. S. v. Brooklyn Eastern District Terminal, 249 U. S. 296, 63 L. Ed. 613;

Terminal Taxicab Co. v. Kutz, 241 U. S. 252, 60 L. Ed. 984.

The latter case has been cited with approval in a recent decision of the Supreme Court of Arizona (*Claypool v. Lightning Delivery,* 38 Ariz. 262, 299 Pac. 126), wherein the court used the following language:

> "So in this, as in any other similar case, it is the general conduct of the actual business and not isolated acts, public or private, which fix the character of a common carrier on a party. And no form of subterfuge or evasion will prevent the courts from going behind the form to the substance." (*Italics ours*).

FOURTH

That the Court erred in not making order with respect to the taxing of costs, because no costs should or could have been taxed against appellees for the reason:

(1) That Appellant B. H. Dodt, as Receiver appointed by the State Court was not an indispensable or necessary party to the appeal, and did not, and could not as such receiver, pay or incur any of the costs thereof.

(2) That the Appellant Security Building and Loan Association, having admitted its insolvency and the commission of an act of bankruptcy prior to the Amendment under which it claims exemption from the operation of

the Bankruptcy Act, and having surrendered all of its assets to the Receiver appointed by the State Court, could not pay any of said costs, nor recover them herein.

(3) That the appeal being directed against R. E. L. Shepherd, in his capacity as a Receiver appointed by the Court at a time when the alleged bankrupt was admittedly subject to adjudication, the costs, if any assessed, should be against the estate that came into his hands as such Receiver.

(4) That no supersedeas bond having been given and a trustee having been appointed by the Court, and he not being made a party to these proceedings, and the Court having admittedly had jurisdiction to declare the alleged corporation bankrupt at the time the petition was filed, no costs should have been taxed against the petitioning creditors, they being merely the representatives of all the creditors.

(5) That this is a proper case for the exercise of the discretion of the Court in requiring the parties to the appeal to pay their own costs, the common rule being that when a proceeding is dismissed for want of jurisdiction, neither party recovers costs.

AUTHORITIES

The common rule is that when a proceeding is dismissed for want of jurisdiction, neither party recovers costs.

In re Jourdan, 111 Fed. 726 (C. C. A.) Mass., 55

L. R. A. 349;

Citizens Bank v. Cannon, 164 U. S. 319, 41 L. Ed. 451;

Nashville v. Cooper, 73 U. S. (6 Wall. 250), 18 L. Ed. 851;

Hornthal v. Keary, 76 U. S. 560-567, 19 L. Ed. 560.

The Court may decline to assess costs on appeal against petitioning creditor.

In re McCrae, 161 Fed. 246, 20 L. R. A. (N. S.) 246. (2nd C. C. A.)

The Court should not assess costs against an officer of the Court defending the possession of the Court.

In re Jourdan, 55 L. R. A. 349, 111 Fed. 726 (C. C. A.) Mass.

WHEREFORE, premises considered, Mary Rose, Ray L. Rose, Joe Ramos, Lillian M. Erwin, Luther M. Frink, E. Dale Frink, John H. Digges, and R. E. L. Shepherd, Receiver in Bankruptcy, Appellees as aforesaid, pray that a rehearing be granted herein, and that on such rehearing the motion of Appellees herein to dismiss the Appeal prosecuted to this Court from the District Court of the United States for the District of Arizona be granted or, in the alternative, that this Court render judgment affirming said judgment of the District Court of the United States for the District of Arizona adjudicating the Security Building and Loan Association

a bankrupt, and for such other and further relief as may be meet in the premises.

Alice M. Birdsall

ALICE M. BIRDSALL,

Attorney for Appellees Mary Rose, Ray L. Rose, Joe Ramos, Lillian M. Erwin, Luther M. Frink, E. Dale Frink and John H. Digges.

Thomas W. Nealon

THOMAS W. NEALON.

Attorney for R. E. L. Shepherd, Receiver in Bankruptcy.

UNITED STATES OF AMERICA)
DISTRICT OF ARIZONA)
STATE OF ARIZONA) ss.
COUNTY OF MARICOPA)

I, Thomas W. Nealon, one of the counsel in the above styled and numbered cause, do certify that I believe there is merit in the foregoing petition for rehearing, and that the same is not filed for delay.

Thomas W. Nealon

THOMAS W. NEALON.

Before me, the undersigned authority, on this day personally appeared Thomas W. Nealon, counsel for

Appellee R. E. L. Shepherd, Receiver, who, upon oath says that there is in his opinion merit in the foregoing petition for rehearing, and that the same is not filed for delay.

Thomas W. Nealon

THOMAS W. NEALON.

Subscribed and sworn to before me this 29th day of June, 1933.

My Commission expires June 18, 1935.

Bess M. White

BESS M. WHITE,

Notary Public in and for the County of Maricopa, State of Arizona.

APPENDIX

Section 587 (subdivision 3) Revised Code of Arizona 1928.

The Articles shall contain * * * * * * 3. the amount of capital stock authorized and the time when and the conditions upon which it is to be paid in. The articles may provide for the issuance of one or more classes of stock and stock without par value, in such number of shares, with such rights, and preferences, as shall be stated in the articles; that the issuance and sale of shares without par value will be for such consideration as is prescribed in the articles; that shares without par value shall be deemed fully paid and non-assessable;

Section 220, Revised Code of Arizona 1928:

Licenses; private banks prohibited. The superintendent shall prepare and furnish to every building and loan association or bank doing business in this state a license authorizing said institution to use the name and transact the business of such institution during the fiscal year of issuance thereof, and to each new building and loan association or bank which shall have been by him approved to do business in this state as hereinafter provided a license for the unexpired portion of the fiscal year in which such license is issued. Any building and loan association or bank transacting the business pertaining to such institution without securing such annual or other license as above provided shall pay a fine of fifty dollars for each day of such default. The superintendent shall receive five dollars for each license issued under the provisions of this section. No license shall be issued to private or partnership banks and their establishment or maintenance is prohibited.

No. 7102

United States
Circuit Court of Appeals
For the Ninth Circuit

HARRY D. McCLEARY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana.

PERNAU-WALSH PRINTING CO., 755 MARKET ST., SAN FRANCISCO

No. 7102

United States
Circuit Court of Appeals
For the Ninth Circuit

HARRY D. McCLEARY,

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vs.

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Upon Appeal from the District Court of the United States for the District of Montana.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX TO BILL OF EXCEPTIONS

Index

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

MESSRS. SMITH, MAHAN & SMITH, of Helena, Montana,

MR. HOWARD TOOLE, of Missoula, Montana, and

MR. W. E. MOORE, of Missoula, Montana,

Attorneys for Plaintiff and Appellant.

MR. WELLINGTON D. RANKIN, United States Attorney,

MR. D. L. EGNEW, Assistant U. S. Attorney,

MR. SAM D. GOZA, JR., Assistant U. S. Attorney, and

MR. D. D. EVANS, Chief Attorney U. S. Veterans Administration,

All of Helena, Montana,

Attorneys for Defendant and Appellee. [1]*

*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States in and for the District of Montana.

No. 1557

HARRY D. McCLEARY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

BE IT REMEMBERED, that on April 26, 1932, the plaintiff filed his complaint herein, in the words and figures following, to-wit: [2]

In the District Court of the United States, in and for the District of Montana, Missoula Division.

No. 1557

HARRY D. McCLEARY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT AT LAW.

Comes now the plaintiff above named and for cause of action against the defendant, complains and alleges:

I.

That the plaintiff was at all times herein mentioned and now is a citizen of the United States of America and a resident of the State of Montana.

II.

That on or about the 29th day of March, 1917, at Miles City, Custer County, Montana, the above named plaintiff enlisted and was inducted into the armed forces of the United States of America, defendant, with the grade of Private, and served the United States of America in the Infantry Division from the date of his enlistment to and including the 9th day of May, 1919, and was during all of said time employed in active service of the United States of America under the direct supervision of the War Department in the war with Germany and her Allies.

III.

That on or about the month of December, 1917, the plaintiff herein made application for insurance under the provisions of Article IV of the War Risk Insurance Act of Congress and the regulations of the War Risk Insurance Bureau established by said Act for the sum of $10,000.00; that there- [3] after and during plaintiff's term of service under the War Department as aforesaid, there was deducted from his monthly pay for such service for the United States of America, defendant, through its proper officials, the monthly premiums upon said War Risk Insurance provided for by said Act and all rules

and regulations promulgated thereunder by the Bureau of War Risk Insurance and by the Director thereof.

IV.

That during the period of plaintiff's service and as the direct and proximate result of such service, the plaintiff was injured and suffered the following diseases, to-wit: On or about the 26th day of October, 1918, plaintiff was gassed by inhaling poisonous gasses into his lungs, while fighting in the Meuse-Argonne Offensive in France; that on or about November, 1918, plaintiff became afflicted with and suffered from influenza; on or about January, 1919, plaintiff became afflicted with and contacted chronic active pulmonary tuberculosis and has been afflicted with and suffered from chronic active tuberculosis continuously since on or about January, 1919; that as the direct and proximate result of said injuries, diseases, the sequela thereof and the disabling effects therefrom, plaintiff became permanently and totally disabled on May 9, 1919, ever since has been, and now is permanently and totally disabled; that as the direct and proximate result of said injuries, diseases, the sequela thereof and the disabling effects therefrom, plaintiff has been unable to follow any occupation whatsoever since May 9, 1919, and that said injuries, diseases, the sequela thereof and the disabling effects therefrom are of such a nature and character so as to render it reasonably certain that the plaintiff will be unable to follow any occupation and that the permanent and

total disability of plaintiff will continue throughout his lifetime. [4]

V.

That the plaintiff was on the 9th day of May, 1919, honorably discharged from the United States Army and from the service of the United States of America as aforesaid.

VI.

That the plaintiff on or about December 23, 1930, made a written demand upon the United States of America through the Veterans Administration of the United States and the director thereof for the benefits of said insurance and for the monthly payments due under the provisions of said War Risk Insurance Act for permanent and total disability; that the said Veterans Administration and the said director thereof in an opinion by the Insurance Claims Counsel dated November 30, 1931, denied the said claim of plaintiff to the benefits of the War Risk Insurance Act and refused to grant plaintiff said benefits, and in the letter of notification to this plaintiff stated, quote: "You may consider such denial final for the purpose of instituting a suit," and said Veterans Administration, the said Director thereof, the Administrator of Veterans Affairs and the defendant herein has continuously refused and does wholly refuse to grant plaintiff said benefits and there is now a disagreement existing between the plaintiff and the United States Veterans Administration and the Administrator thereof within

the meaning of the War Risk Insurance Act of Congress and the Amendments thereof.

VII.

That under the provisions of the War Risk Insurance Act and the other Acts of Congress relating thereto, plaintiff is entitled to a payment of $57.50 for every month since the 9th day of May, 1919, to the date of the filing of this Complaint, and there is now due the plaintiff from said date by reason of the premises, the sum of $8855.00. [5]

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Eight Thousand Eight Hundred Fifty-Five and No/100 Dollars ($8855.00) and such other and further payments as may now or hereafter be due and payable under the terms of the War Risk Insurance Act of October 6, 1917, and all amendatory Acts, and there be paid to plaintiff's attorneys as a reasonable attorney's fee herein 10% of the amount or amounts recovered under the judgment and paid in accordance with the provisions of the War Risk Insurance Act and all amendatory Acts, and to be deducted from such payments made to plaintiff.

SMITH, MAHAN & SMITH,
Attorneys for Plaintiff,
Helena, Montana. [6]

State of Montana,
County of Lewis and Clark.—ss.

Harry D. McCleary, being first duly sworn, deposes and says: That he is the plaintiff in the above and foregoing complaint at law; that he has read said complaint and knows the contents thereof, and that the matters and things therein stated is true of his own knowledge, except those statements made upon information and belief and as to those he believes it to be true.

HARRY D. McCLEARY.

Subscribed and sworn to before me this 25th day of April, 1932.

[Seal] C. E. PEW,
Notary Public for the State of Montana,
Residing at Helena, Montana.

My commission expires Sept. 30, 1932.

[Endorsed]: Filed April 26, 1932. C. R. Garlow, Clerk. [7]

Thereafter, on June 29, 1932, answer was duly filed herein, in the words and figures following, to-wit: [8]

[Title of Court and Cause.]

ANSWER.

Comes now the defendant and for answer to the complaint of the plaintiff herein admits, denies and alleges:

I.

Admits the allegations of paragraph I of the complaint herein.

II.

Admits the allegations of paragraph II of the complaint herein.

III.

Admits the allegations of paragraph III of the complaint herein and in this connection alleges that the plaintiff made application for insurance in the amount of Ten Thousand Dollars ($10,000.00) on November 16, 1917, and that premiums were deducted from his pay during his service in the army, and that said Ten Thousand Dollars ($10,000.00) term insurance lapsed and was cancelled on the 1st day of July, 1919, for failure of the plaintiff to pay the premiums due thereon for the month of June, 1919.

IV.

Denies each and every allegation, matter and thing contained in paragraph IV of the complaint herein. [9]

V.

Admits the allegations contained in paragraph V of the complaint herein.

VI.

Admits the allegations of paragraph VI of the complaint herein and that a disagreement existed between the plaintiff and the defendant on December 1, 1931.

VII.

Denies each and every allegation, matter and thing contained in paragraph VII of the complaint herein and each and every allegation, matter and thing not heretofore specially admitted, qualified or denied.

WHEREFORE, the defendant prays judgment that the complaint of the plaintiff herein be dismissed and that the defendant have its costs.

WELLINGTON D. RANKIN,
United States District Attorney for the
District of Montana,
By D. L. EGNEW,
Assistant United States Attorney,
D. D. EVANS, Insurance Atty.,
(Attorneys for the Defendant). [10]

State of Montana,
County of Lewis and Clark.—ss.

D. L. Egnew, being first duly sworn, deposes and says that he is the Assistant United States Attorney in and for the District of Montana and one of the attorneys for the defendant named in the foregoing answer, and as such is acquainted with the facts in the case; that he has read the answer and knows the contents thereof, and that the same are true to the best of his knowledge, information and belief.

D. L. EGNEW,
Assistant United States Attorney.

Subscribed and sworn to before me this 25th day of June, 1932, at Helena, Montana.

[Seal] MARJORIE McLEOD,
Notary Public.

Notary Public for the State of Montana.
Residing at Helena, Montana.

My commission expires March 31st, 1934.

[Endorsed]: Filed June 29, 1932. C. R. Garlow, Clerk. [11]

Thereafter, on Oct. 6, 1932, the verdict of the jury was duly rendered and filed herein, in the words and figures following, to-wit: [12]

[Title of Court and Cause.]

VERDICT.

We, the jury, in the above entitled cause find for the defendant and against the plaintiff on all of the issues.

T. U. GIBSON,
Foreman.

[Endorsed]: Filed Oct. 6, 1932. C. R. Garlow, Clerk. [13]

Thereafter, on December 3, 1932, judgment was duly entered herein, in the words and figures following, to-wit: [14]

In the District Court of the United States for the District of Montana, Missoula Division.

No. 1557

HARRY D. McCLEARY,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT.

This cause came on regularly to be heard this 6th day of October, 1932, before George M. Bourquin, Judge, sitting with a jury, the plaintiff being represented by John W. Mahan, W. E. Moore and Howard Toole, his counsel, and defendant being represented by D. L. Egnew, Assistant United

States Attorney, and D. D. Evans, Chief Attorney, Veterans Administration. Whereupon a jury was duly impaneled to try the cause and witnesses were called, sworn and testified on behalf of plaintiff and said plaintiff rested his cause; thereupon witnesses were called, sworn and testified on behalf of defendant and said defendant rested its cause.

Thereupon defendant made a motion for a directed verdict upon the ground that the evidence was insufficient to support a verdict in behalf of plaintiff, which said motion after argument by counsel for the respective parties was granted by the court and thereupon a verdict, signed by the foreman, finding for the defendant and against the plaintiff on all the issues, was returned herein as directed by the Court.

Whereupon, upon consideration thereof and by virtue of the law and premises aforesaid,

IT IS CONSIDERED AND ADJUDGED, that plaintiff take nothing by this action. [15]

It is further considered and adjudged that the defendant, the United States of America, do have and recover of and from the plaintiff its costs and disbursements herein expended, taxed in the sum of $30.00.

Entered this 3rd day of December, 1932.

C. R. GARLOW,
Clerk, U. S. District Court,
District of Montana,
By G. DEAN KRANICH,
Deputy. [16]

Thereafter, on December 31, 1932, bill of exceptions was duly settled, allowed and filed herein, in the words and figures following, to-wit: [17]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED: That the above entitled action came regularly on for trial in the above entitled court at Missoula, Montana, on Thursday, the sixth day of October, 1932, before the Honorable George M. Bourquin, Judge, and a jury duly and regularly impaneled and sworn to try the same, upon the pleadings theretofore filed in said action. The plaintiff was present in court and represented by counsel, John W. Mahan, of the firm of Smith, Mahan and Smith, of Helena, Montana, and by Howard Toole and W. E. Moore, both of Missoula, Montana. Defendant was represented by D. D. Evans, Chief Attorney for the United States Veterans' Administration, Fort Harrison, Montana, and by D. L. Egnew, Assistant United States Attorney of Helena, Montana.

Thereupon the following proceedings were had and taken and the following evidence was introduced, and none other:

The case was called for trial. A jury was drawn, selected and sworn to try the case. Opening statement on behalf of plaintiff was made by Mr. Mahan. Opening statement on behalf of the defendant was made by Mr. Evans.

Thereupon the following evidence was introduced by plaintiff [20] upon his case in chief:

HARRY D. McCLEARY,

the plaintiff, was called as a witness in his own behalf and having been first duly sworn testified as follows:

Direct Examination
by Mr. Mahan.

By the WITNESS.—My name is Harry D. McCleary. I am the plaintiff in the case of Harry D. McCleary against The United States of America. I have resided in Montana for approximately two years and am now living with my father-in-law, W. E. Moore, at 302 East Sixth Street, Missoula, Montana. I was in the army, having enlisted on the 29th day of March, 1917, at Miles City, Montana, in the Infantry, and I was in service twenty-three months, being discharged on the ninth day of May, 1919. I made application for and was granted war risk insurance in the amount of Ten Thousand Dollars, the premiums on which were paid from I think about December, 1917, up until the date of my discharge, the ninth day of May, 1919.

I was gassed in the Argonne on the 26th of October, 1918; I inhaled gas and it made me very sick at the time. I also had influenza while in the army, which I contracted after I was taken to the hospital from the Argonne. I was in the base hospital at Nance, France, and as I remember it was a patient there between four and five months. At that time I was under weight, had night sweats which were severe and I run a temperature all the time. I was discharged from the army at Fort

(Testimony of Harry D. McCleary.)

D. A. Russell, Wyoming, and I then went directly home, at Twin Falls, Idaho, where I made my home with my mother and father. I got to Twin Falls I believe on the 11th of May, 1919. After that I didn't [21] do anything, I wasn't in any condition to do anything. During the time that I didn't work or try to work I was at home from the date of my discharge, about a year at that time, and I was sick all of that time and not able to do anything. I felt weak and didn't have any energy to do anything. My joints bothered me, I had a cough and chest pains, coughed and spit up a lot of sputum all the time. During this period I consulted a physician, Dr. Duncan Alexander, of Twin Falls, Idaho, under whose care I was, I guess, for about three or four months. I was bedfast for about three months of this time. When I got up after having been bedfast I didn't do anything. The first time I did anything or attempted to do anything after the war was when I took vocational training, which I figure was in December, 1920, in the late fall of 1920. Before entering the army I had had an eighth grade education. I had been helping my father on the ranch when I enlisted. The first thing I took in vocational training was bookkeeping and accounting at the Lynch Business College at Boise, Idaho. As I remember it I was in that institution of training for about eight or nine months. During that time my condition physically was very bad, I coughed a lot and was weak and under weight all the time and didn't have energy to do anything. I did not attend

(Testimony of Harry D. McCleary.)

school regularly because I wasn't able to, in my condition; I was sick and feverish and felt that way. I did not get along good at all in the training for my objective. I left school because the Government discontinued my training on account of my physical condition; I was training as a bookkeeper and accountant. After discontinuing my training at Boise I went home and stayed four months, during which time I did nothing, because I was sick and I did not feel like working, I was under weight, I coughed, and had night sweats and run a temperature [22] all the time. I was that way during all of this period. I next went to Spokane, after staying home, and went into training, taking up window display work, which was institutional training; this I did at the Culbertson Department Store in Spokane. That is what is called placement training. As I remember I was there about eight or nine months, during which time I had night sweats, coughed a lot, and I did not work regularly, on account of my physical condition. I left that training at Spokane after eight or nine months because I thought California might be beneficial to my condition, so I went from Spokane to California, to San Jose, where I worked for Al Harkness Sons at show card writing, off and on, as I remember, for about a year. I did not work regularly. During all of this time I had night sweats and coughed a lot, had a temperature all the time and was under weight. I quit the job after eight or nine months on account of my physical condition. After quitting

(Testimony of Harry D. McCleary.)

that place I went to San Francisco and after several months I went to work there for the Pomin Corset Company, doing the same kind of work, show card writing. I was not rehabilitated as a show card writer, but I did follow that trade. Mr. Pomin was my boss. I had a job there writing cards and doing a little display work, and the work was very light; Mr. Pomin knew of my condition; I had so much to do and I took my time about doing it all the time, and that's the way I got by with my job. It was practically the same way, in the position I had before, the work did not require all of my time; if I had been a healthy person I could have done the work that I did in about a third of the time. While working I was under weight, coughed a lot and spit up bad sputum. After leaving that job I didn't do anything for several months, I rested, because I was sick, and by [23] that I mean that I had the same symptoms that I have already related. The next job I had was with Hale Brothers, in San Francisco. I made an attempt to bring this Mr. Pomin here as a witness; he promised me that he would come here in the capacity of a witness in my behalf, but he died and of course he couldn't be here; he died two years ago, I believe, as I remember it, or I guess, rather, that it was a year ago. After I left Mr. Pomin I didn't do anything for several months, after which I got a job with Hale Brothers in San Francisco, doing show card work for a while for them, but I did not work steady, I worked off and on, because

(Testimony of Harry D. McCleary.)

I was sick, had coughs, night sweats, temperature all the time. After I left Hale Brothers I was out of work for several months and was sick at home. Several months later I went back to Hale Brothers and the manager there feeling sorry for me, I guess, gave me a lighter job in the institution, selling radios in the radio department. I followed that for about three months, I believe, and I couldn't stay with it longer because I couldn't, I had to quit working on account of my physical condition. I haven't done any work since then.

I was first advised by a physician attending me, in 1920, that I had tuberculosis. He advised me how to take care of myself; he advised me to sleep outside and not to work, but I did work because I had a wife and family to support, and I worked whenever I could and whenever I was able to. With no more work than what I have told about here I was able to get along because I had help from other sources, help from my father-in-law, Mr. W. E. Moore, and I also had help from my own family and from the Government; I get compensation from the Government. [24]

Since I left Hale Brothers the last time I have been in the hospital, in the United States Veterans' Hospital most of the time. I have been advised by examiners in the Veterans' Bureau hospital as to what my condition or disability is, the United States Government gave me a total permanent disability, for pulmonary tuberculosis. There is a way

(Testimony of Harry D. McCleary.)

a person can tell when they have that disease, and I don't have any trouble knowing I have it for I cough a lot, spit up bad sputum and blood, sometimes, and I have night sweats all the time and run a temperature in the meantime. I think my condition has altered some since I got out of the hospital and the army; my condition has steadily grown worse all the time since I was discharged from the service. Since my discharge I have not been free from temperatures; I have not been free from the pain condition in the chest. Dr. Alexander treated me for several months at Twin Falls, Idaho, in 1920, and he tapped my left lung and took fluid out of it, I don't know how much, I was too sick to know at that time. I think I spent about seventeen or eighteen months in the Veterans' Bureau hospital. I made demand for this insurance and it was refused, I made a demand, I believe, in December, 1930, and it was refused, I think, one year later.

Cross-examination
by Mr. Evans.

By the WITNESS.—The first disability I suffered while in the army was by being gassed, on the Argonne in October, 1918. Some time after this hospitalization for the gassed condition I had influenza. From the time I was gassed until my discharge I never saw active service again, I was in the hospital almost all the time, in Nance, Frane.

(Testimony of Harry D. McCleary.)

I was discharged at Fort D. A. Russell, Wyoming. I was examined when I was dis- [25] charged, that is, I guess I was, in a way. I do not remember Major Elmore, at Fort D. A. Russell. You might call it an examination, which was given me at Fort D. A. Russell, before I was discharged. I haven't my discharge with me. I don't remember exactly what my discharge, dated May 9, 1919, says as to my physical condition at the time I was discharged. I do not dispute that at the time of my discharge on May 9, 1919, my physical condition was "Good." I do not remember that Major Elmore, the examining surgeon who examined me at the time of my discharge, stated that I was physically and mentally sound and no percent disabled. I don't recollect that I got a surgeon's certificate of disability when I was discharged. I was not discharged for physical reasons. I have not made any effort or endeavor, either myself or through counsel, to get the army records of my being gassed or of my being hospitalized. I haven't, I guess, any proof to offer as to my physical condition at the time of my discharge, except my own word that I am not feeling good, due to this gassing. At the time of my discharge I don't believe I made any complaint as to my physical condition or of the results of this gassing, in my claim, in fact I was anxious to get home and get out of the service, the same as all the other boys were. I made no claim of disability at that time. I guess I didn't, at that time, claim I was

(Testimony of Harry D. McCleary.)

totally disabled from either gas, influenza or tuberculosis.

Immediately after I was discharged I went to Twin Falls, Idaho, where my father lived. I didn't do anything at that time only stay home with my family. After my illness, when I was taken care of by Dr. Alexander, I made a claim to the United States Government. As to my stating in that claim, made, it is said, on the 18th of June, 1920, that from the time of my discharge from the army, in answering the questions [26] concerning my occupation since discharge, and the dates, I stated that I was farming from May, 1919, to July, 1919, at $75.00 per month, and that I worked at the carpenter trade in July, 1919, for two weeks, and asked what I have to say as to that employment, well, in farming, my father had a little five-acre tract in Twin Falls, and I guess that's what I meant by farming. What work I done I worked for my father, but I did not receive $75.00 per month. As to that statement made under oath being in error when I said that I received $75.00 per month, well I don't remember of making any $75.00 a month. If there was any work that I did do between May, 1919, and May, 1920, it was around my father's little five-acre tract in Twin Falls. I was not married at that time. I married in 1923, which was after my training period. I was with Al Harkness Sons in San Jose at the time of my marriage. At the time I was married I got help

(Testimony of Harry D. McCleary.)

from my parents several times; they were in Twin Falls, Idaho. At the time I was married I was receiving $35.00 a week or somewhere around there, in wages, $30.00 or $35.00 a week, as I remember it, at San Jose. I believe I had been working for two, or two or three months, as I remember it, for these people at San Jose, before I was married, at the figures stated. I was receiving very little compensation or support from the Government, as I remember it, at the time of my marriage, I believe $10.00 a month. Asked what led me to believe that I could be married and support a wife and family, if I was totally disabled and unable to follow any gainful occupation at that time, and why I believed that I could not only support myself but also support a wife, well at that time I hoped that possibly some day I might be better, I had hopes of getting better. [27]

I believe I started in this training the late fall of 1920. I received $100.00 a month from the Government. I took several months bookkeeping and accounting work and there was so much inside work to it that I wasn't feeling so good, and I had a chance to take up sign painting, and after I was there some time I took sign painting with the Hopffgarten Sign and Advertising Company for a very short period of time. As I remember it I had that training for about nine months. As I remember it I started in training again about three or four months later and continued for approximately

(Testimony of Harry D. McCleary.)

nine months or a year, in Spokane. I quit training because I wanted to go to California, I thought the climate there would be beneficial to my condition. I quit at the same time one Matt Egan quit; he was in training also. Egan and I were together for a period of considerable time, that is, sort of together. I next made contact with the United States Veterans' Bureau or its agents, shortly after I went to California, I don't remember exactly how soon after but I imagine two or three or four months, along in there somewhere. If the record shows that I discontinued training about January 24, 1923, and next contacted the United States Veterans' Bureau in 1924, a year and several months later, I will not dispute that record. During the time I was in training asked if I had frequent visits from nurses who checked up on my physical condition, I will say that I do not remember any visits by any nurse when I was in training, and I will say that I did not, to my recollection, have such visits. I did, however, have treatment by doctors of the United States Veterans' Bureau for current illnesses such as colds, and so forth. I don't remember exactly how often I reported or how much time I lost by reason of colds or slight or greater illnesses during that period, but I did lose quite [28] a bit of time on account of my condition. Asked why I didn't report to the United States Veterans' Bureau if my physical condition was such as to render me totally disabled, or why I didn't report

(Testimony of Harry D. McCleary.)

to the Government during that period of one year, in 1923, when I was in San Jose, California, well I didn't figure it would do me any good if I did. I knew that I was entitled to treatment in a hospital any time I needed it. As to my not so reporting from January, 1923, until some time in 1924, well at that time I was ignorant of the fact that there were Government hospitals in existence; I didn't know of any Government hospital. I do not recollect whether I was examined in 1924 by Dr. Seid, of San Francisco, California; I do not remember Dr. Seid. Asked if I appeared before an appeal board in San Francisco, making claim for compensation on account of my physical condition, over a period from 1923 until the time when I made this claim in 1924, I believe that I did, yes. I do not remember whether at that time I made any claim for compensation on account of pulmonary tuberculosis. As to whether I was asked to submit evidence or affidavits concerning my physical condition and whether I did so or not, my answer is that I do not remember ever being asked to. I don't remember whether I made a claim for pulmonary tuberculosis at that time. I don't remember whether I made a claim for pulmonary tuberculosis, to the United States Government in November of 1924, when I was before the appeal board. I don't remember whether I was examined by Dr. Seid. I wouldn't dispute it that Dr. Seid, an official of the United States Government, examined me in Novem-

(Testimony of Harry D. McCleary.)

ber of 1924, or thereabouts. From 1925 or 1926 I did again receive compensation. I failed in my appeal to get the compensation for disability covering the period from January, 1923, [29] until 1924, when I was examined. Asked how much compensation I received and what percent disability I was rated as entitled to compensation for on account of all of my disabilities from 1925 until some later date, my answer is that I got $50.00 a month. In 1920 was the first time I was found to be totally disabled from pulmonary tuberculosis, by the United States Government. Last year at Fort Harrison, Montana, was the first time I was found by the United States Government to be permanently and totally disabled; that was in 1931 when I received that rating.

Redirect Examination
by Mr. Mahan.

The WITNESS.—As to my having said I was examined in a way when I was discharged from the army, well I was; they had so many to discharge and I was run through a line with one doctor here and one there, and they tapped me on the chest and on the knees and that was the end of it and that was all the examination I had, which I imagine consumed maybe two minutes for the entire examination. I don't know whether or not they were giving any surgeon's certificates for disability discharge at that time.

(Testimony of Harry D. McCleary.)

Q. Were you returned to duty before you were discharged?

A. No, sir, I wasn't.

Mr. EVANS.—Objected to,—well I move that it be stricken as not the best evidence.

The COURT.—Oh, I think it is. Motion denied.

As to my having told Mr. Evans that I depended entirely on my own testimony in regard to my condition from the date of my discharge, well my family saw me at that time. I saw my mother soon after my discharge, two days after, in fact, and she [30] is here in the court room. There isn't any physician here in the court room who attended me soon after my discharge, Dr. Duncan Alexander isn't here in the court room but his testimony is here in the form of a deposition. The first time I was rated by the Bureau as totally disabled was in 1920; it wasn't determined to be permanent but was on a temporarily total basis. Some time in 1931 they decided it was permanent.

After I was discharged I first went to the government hospital in 1930. I didn't go before because I didn't know there were any Government hospitals. The first time I was given a physical examination by the government, in which sputum tests were made and x-rays taken and observation made was in 1920, by the United States Government doctors. I believe the doctor's name was Swartz, at Pocatello, and Dr. Hal Bieler, Twin Falls, Idaho. Dr. Bieler is the first government doctor I con-

(Testimony of Harry D. McCleary.)

tacted in regard to this case. I have made an attempt to get in contact with those doctors. I was unable to find Dr. Bieler, I don't know what became of him. I don't know whether Dr. Swartz is still in Pocatello or not. I do not mean to say Dr. Swartz, but rather, Dr. Sprague, that is my error. After 1920, and after those two diagnoses were made by those two Government doctors, the next time I was under observation of Government doctors where sputum tests were made, x-rays taken and continued observation made was in 1930. And none of those tests were made of me in any of these examinations referred to by Mr. Evans. The examinations made of me while I was in training consisted of questioning and maybe sounding or with a stethoscope; I don't remember whether they even used a stethoscope on my chest or not.

I have seen this application, form 526, before. This is my signature. As to it being filled out on a typewriter, well [31] I did not do that, nor do I recollect who did fill it out. As to this being signed by Henry J. Wall as a Notary Public, and asked whether I signed it in his presence, well I do not remember the man. As to it being written out here on a typewriter that I farmed from May, 1919, to July, 1919, two or three months in 1919 at $75.00 a month, I will say that I don't remember ever getting $75.00 a month for farming. At that time I was home in Twin Falls, Idaho, living with my father. As to this carpenter work for two

(Testimony of Harry D. McCleary.)

weeks, well if I done any carpenter work it was around the home there. I was at Twin Falls, Idaho, when this application was made out. I do not recollect Mr. Wall.

As to my reasons for getting married, other than that I thought at the time I might get better, well, like any other man, I loved my wife, I guess, loved the girl, and I wanted to marry her.

Witness Excused.

JOSEPHINE McCLEARY

was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination
by Mr. Mahan.

By the WITNESS.—My name is Josephine McCleary. I am the wife of Harry D. McCleary, the plaintiff in this case. I was married on July 12, 1923. I had met Mr. McCleary in Spokane the year before I married him. I lived in Spokane at the time. Asked if I ever observed anything about his condition, before I married him, which would indicate anything not exactly normal, well I knew that he had been gassed; he told me that. I knew that he was there taking training. And I noticed that he coughed almost constantly. After we were married we went to [32] San Jose, California, about

(Testimony of Josephine McCleary.)

a week after we were married. After we were married I noticed an indication that his health was not good. I think the second week after we were married he was to work, and I noticed that he coughed almost constantly and especially at night, and he was exhausted and he just didn't seem natural or normal to me, he just didn't seem well; it seemed like he would get feverish and irritable. I have been with him part of the time during the past two years and I am living with him now. He has that constant cough now and brings up a lot of sputum sometimes. I noticed the same symptoms right away after we were married. I was living with him when he was writing those cards down there in the windows in San Jose. He wasn't well at all during that period that he worked there; I might say that pretty nearly all of the time he wasn't well; I observed that he coughed so much at nights; then he didn't get his breath and often he wasn't able to go to work. I also observed the indications of night sweats that he testified to. I observed those first very shortly after we were married, in fact right after we were married. After we left San Jose we went to San Francisco. I was with him when he was working there. His condition was just the same then, he seemed to me to be growing steadily worse. When he was at rest he seemed to be better than when he was working. As to his condition being different when he was working from what it was when he was not work-

(Testimony of Josephine McCleary.)

ing, well I think he was running a temperature most of the time and he seemed to be driving himself in everything that he did. He has not been well or normal, like any other man, since we have been married. I have a family of two children, and reside here.

Cross-examination
by Mr. Evans. [33]

The WITNESS.—I first met Mr. McCleary in 1922, in Spokane. I was married in July, 1923. Shortly after that we returned to San Jose to live. During that time my husband was occupied in doing show card writing. He stayed there in employment in San Jose after we were married, until the following April, which would be April of 1924. During that period he received in salary or wages $30.00 a week. Asked how much time he lost from that employment and how much money was deducted from his wages during that ten months, why he lost a great deal of time, he was off from work a lot and part of the time in bed, I couldn't say just the exact amount but he was deducted every time he was out, of course. I can't say definitely the exact amount he was deducted, I know that he missed lots of work and when he didn't work he wasn't paid for it. I have had much difficulty in meeting the family budget by reason of loss of wages. In San Francisco he worked for the William C. Pomin Corset Company. That employment, however, didn't be-

(Testimony of Josephine McCleary.)

gin immediately afterwards, in April of 1924, he didn't go to work then but I worked during that time until he went to work. After we went first to San Francisco he didn't go to work right away, but started within a couple of months, I think. I should think we might understand that he started to work there in the summer, in June or July of 1924, in San Francisco, working for the Pomin Corset Company, doing the same thing, show card writing and display work. His salary I think was about the same, $30.00. He continued in the employment of the Pomin Corset Company for over three years. The nature of his work was the same, display work and show card writing. He lost a great deal of time at that employment, he was home in bed; I would say that he really didn't work what you might say a whole day; Mr. Pomin was very kind to us and he helped to make his [34] work easy. I can't say definitely how much time he lost. While we were in San Jose Mr. McCleary consulted physicians and doctors; I couldn't, however, remember who they were, I couldn't remember the doctors' names. I couldn't say whether there was a Dr. Bullock there; I don't remember such a person. I do not remember the names of any doctors with whom he treated in San Jose, I was new there. In San Francisco, however, I remember the names of the doctors; there was Dr. Riley and Dr. Newton. Asked what he was treated for by these doctors, well he had had pleursy badly and wasn't

(Testimony of Josephine McCleary.)

able to work, and he was run down. Asked when, if ever, I was advised by any doctor that my husband was suffering from active pulmonary tuberculosis, well I knew that he had been gassed, before I was married, and I knew that he was getting compensation and taking his vocational training. I know that active pulmonary tuberculosis is communicable and that it is dangerous to persons living in the same household with a person and that it is the custom of doctors to advise the family of that condition. Asked, again, when I was first advised of the dangerous condition of my husband from that disease, my answer is that I never talked to one of my husband's doctors myself, until these last two years. The nurse from the Veterans' Hospital in San Francisco, or the Veterans' Bureau, rather, was the first person to advise me of that.

Redirect Examination
by Mr. Mahan.

The WITNESS.—That was in October, 1930. Prior to that I had never talked to any of Mr. McCleary's physicians or to any doctor who had been treating him, nor to any nurse; that was the first time. When he got the compensation, $50.00, is the time when I first knew he had tuberculosis; that, I think, was [35] in 1927.

Witness Excused.

Mr. MAHAN.—If the court please, we have a deposition at this time, taken by stipulation, and we desire to read it.

The COURT.—Proceed.

Mr. TOOLE.—Now this is the deposition of Duncan L. Alexander, a Doctor at Twin Falls, Idaho.

Thereupon was read into the record the deposition of

DR. DUNCAN L. ALEXANDER,

taken in accordance with stipulation at Twin Falls, Idaho, before J. R. Keenan, Notary Public, on October 4, 1932, and the testimony of said witness so given on behalf of the plaintiff is as follows:

Direct Examination
by Mr. Mahan.

By the WITNESS.—My name is Duncan L. Alexander. I reside at Twin Falls, Idaho. I am a physician and surgeon, a graduate of Michigan, a recognized medical school, in June of 1903. I am and have been since April, 1910, licensed to practice medicine in Idaho. I am now practicing at Twin Falls, Idaho, and have been since July, 1910. I have had the plaintiff, Harry D. McCleary, under my professional care. The first record that I have of examining him was on May 16, 1920. Following that date he was under my care until July 19, 1920, which is the last record that I have. I am testifying from records of my office during this time. The day book record was made daily by myself, the

(Testimony of Dr. Duncan L. Alexander.)
ledger record by my bookkeeper under my direction and supervision. I have had the custody of these records since [36] then. During the period of this treatment of plaintiff in 1920, or observation, I made the day book record myself. I am now testifying from the ledger. The day book for May, June and July of 1920 I now have in my hand. The record from which I am now testifying is in the day book, a record kept in my own handwriting. A part of this is from memory and a part is from the records, but when I first examined Mr. McCleary in May, 1920, I found him suffering from a cough, purulent expectoration, temperature continued. I did not find any other symptoms at that particular date, but within four days the patient was bedridden, that is, from May 22, 1920, up to and including June 12, 1920. I visited the patient during that time, examined several specimens of sputum, myself, and had two sputums examined by the laboratory, at Dr. Hal Bieler's laboratory, the sputum in all cases being negative for tubercular organisms, but continued staphylococci and streptococci. During this same period, May 25, a Widal aglutination blood test was done by the same laboratory to determine whether or not there was a typhoid fever present. This examination returned negative. Those sputum examinations were made on May 18th and May 25th, by the laboratory. Others I did myself, several that I remember of. On June 2nd aspiration, or puncture

(Testimony of Dr. Duncan L. Alexander.)

of the plural cavity was made and a large amount of clear yellow fluid withdrawn. I am unable to state which lung was punctured because I have no record. I further examined the patient on the third day of July; the name here is in the book-keeper's handwriting, but the notation is mine. The symptoms were fever, continued cough with expectoration purulent, repeated examination of which showed negative for tubercular organisms. There was pain in the chest and difficulty with respiration, that is, with the [37] breathing, during the acute attack. A dullness in one of the lungs developed about the first of June, 1920, and on the second of June aspirated the plural cavity, without record as to which side, and obtained a clear yellow fluid. I have a record of the clear yellow fluid. At that time my diagnosis of his condition, clinically and not from bacteriological findings, was a tubercular infection, which in my judgment was the thing that was prevalent. Asked if I would classify that as active pulmonary tuberculosis, well it was certainly very active, diseased condition at that time, but my diagnosis was clinical and not with bacteriological evidence.

Q. How long, in your judgment, had the plaintiff been infected with this disease?

Mr. QUIGLEY.—That is objected to as leading and suggestive. There is no proper foundation or showing made that the Doctor has any opportunity to base an opinion in answer to this question, on

(Testimony of Dr. Duncan L. Alexander.)
the previous lung condition, if such was found. It is incompetent, and for that reason is hearsay, not the best evidence.

The COURT.—He may answer. Overruled.

Mr. EVANS.—May we note an exception to the ruling?

The COURT.—It may be noted.

Exception Noted.

A. It is impossible for me to state.

Asked if my judgment is that Mr. McCleary during the period from May to July, 1920, while I had him under my observation, was suffering from some acute condition, my answer is that it was evidently acute because of the fact of temperature, the development of pain in the chest and the presence of fluid, [38] as demonstrated by aspiration.

Q. If it were testified to that the symptoms of temperature, cough, expectoration, had persisted in the plaintiff for a year or more prior to the time you first saw him, would it be reasonable to believe the same to be true?

Mr. QUIGLEY.—Just a moment. Objected to as calling for an opinion or conclusion of the witness upon which he has no physical facts or findings upon which to base an answer. For the further reason that it is leading and suggestive, incompetent, and for that reason would be hearsay. And for the further reason that it assumes a fact not in evidence and is a self serving declaration.

(Testimony of Dr. Duncan L. Alexander.)

The COURT.—I think that we will sustain the objection to that.

Mr. MAHAN.—Note an exception.

Exception Noted.

My records show that I have not made an examination since July 19, 1920. I know nothing about his physical condition since that date. In my judgment Mr. McCleary could not work or follow any avocation during the period I had him under my observation. I have no record of a prognosis in his case.

Cross-examination
by Mr. Quigley.

The Witness. I have testified the man was bedridden from May 22nd to June 12th, both dates inclusive, of 1920. I saw him again and for the last time on the 19th of July, 1920. He had gotten up from his bed during that interval, June 12th to July 19, 1920. The last time I saw him he came to my office. I don't know that I discharged him from under my care, the last [39] time he came to the office, but he was feeling improved. I may have seen him after that but that is the last time of which I have a record. All the sputum tests I made were negative for tuberculosis. Dr. Bieler, a practicing physician and surgeon at Twin Falls during 1920, made some sputum examinations for me. According to the reports those sputum ex-

(Testimony of Dr. Duncan L. Alexander.)
aminations, made at my request, and of this plaintiff, were negative, for tubercular organisms. I did not take any x-ray pictures of this plaintiff. In making the diagnosis I took into consideration the history that he gave me. In testifying just now, and in giving my diagnosis, asked if I took into consideration any of the history which the veteran gave me at that time, my answer is that I have no record, that part of the record I am unable to find, but in giving this diagnosis that I have just given I must have taken into consideration the history that he gave me at the time. All the symptoms I found existing at the time I had Mr. McCleary under observation were fever and a continued cough with expectoration, difficulty in breathing, continued temperature, pain in the chest, with dullness in one of the lungs. That pain in the chest was partially a pleurisy pain. The other symptoms that I have given might be symptoms that would be found in asthma or bronchitis. I want the court and jury to understand that the diagnosis I have given was made simply from clinical findings. The bacteriological findings are negative, in so far as my records show, that is, so far as tuberculosis is concerned. To the best of my remembrance I have not seen the plaintiff, professionally, since July, 1920. The test for typhoid fever which I referred to was negative. Asked if some of these symptoms that I have testified to might not have been symptoms that indicated to me that the veteran's lung

(Testimony of Dr. Duncan L. Alexander.)
condition might [40] have been caused from typhoid infection, well I had the typhoid fever aglutination test done because of the fact that typhoid fever sometimes begins with a bronchitis and a continued bronchitis cough and expectoration accompanied continuously by fever or a temperature higher than normal over a considerable period of time. While Mr. McCleary was under my care, if I remember correctly, the fever decreased after the aspiration of the pleural cavity. As to this whole business being very hazy, my answer is that I have a very good memory and remember things pretty well. I do not know whether Mr. McCleary went to work after he left my care.

Redirect Examination
by Mr. Mahan.

The WITNESS.—It is a practice in the profession of medicine to base a diagnosis partially on the history given by the patient; sometimes the history is of the utmost importance, in fact more important than the clinical findings. Negative sputum for tuberculosis bacilli does not necessarily mean that the patient does not have active tuberculosis. In my judgment the symptoms which I related ordinarily are found in active tuberculosis cases. Asked if asthma is one of the symptoms of tuberculosis, well, asthma is a symptom of some other existing condition. Bronchitis is the result at times of a mechanical condition in and around the bronchi

(Testimony of Dr. Duncan L. Alexander.)
that produces sufficient irritation to produce or result in cough or cough and expectoration. It is sometimes obvious in tuberculosis cases.

Recross Examination
by Mr. Quigley.

The WITNESS.—It is rather difficult for me to say whether or not most every man who smokes has bronchitis in a mild degree; [41] he may have some irritation of the bronchi which will produce a cough. I found rales in this man; they were over the apices, in fact they were general over the chest, as I remember it, but not from the record. I would not want to give any prognosis in this case.

(The deposition was duly signed and verified.)

End of Deposition.

MRS. E. M. McCLEARY

was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination
by Mr. Mahan.

By the WITNESS.—My name is Mrs. E. M. McCleary. At present I reside in Los Angeles, California. The plaintiff in this case, Harry D. McCleary, is my son. He was born in 1897. I was around where he was at the time he enlisted in the

(Testimony of Mrs. E. M. McCleary.)

army. After his return from the army I saw him at home, in Twin Falls, Idaho; that was on Mothers' Day, in May, 1919. I certainly noticed a difference in his appearance than when I last saw him before he went away. He went away a perfect specimen of young manhood and came back a perfect wreck; he was sick, poor and emaciated, coughing, and could hardly walk. After he was discharged he stayed home until the fall of 1920; that would be from May, 1919, to the fall of 1920. He did very little during that period of time, we didn't want him to work, for he wasn't able to work. He didn't have any pep and he had pains in his chest and he was very sick in the spring of 1920. I took care of him when Dr. Alexander was treating him. I would say that he was bedfast for two months at that time, although I just don't remember. Besides Dr. Alexander we had Dr. Bieler, Dr. [42] Hal Bieler. One of these doctors advised me as to what he might be suffering from; Dr. Alexander told me that his sickness had been caused from gas and he was afraid of tuberculosis. After the war he first left home in the fall of 1920. After he left he was in Boise, Idaho, and he came home once in a while, when he would get to feeling so bad he would come home and rest for a while. I have not lived in the same house with him for a period of time since 1920. I couldn't tell you how often I have seen him since that time. Asked if I have noticed any change in his condition now from what

(Testimony of Mrs. E. M. McCleary.)
it was when he first got out of the army, well, in appearance he has improved; he is improved now over what he was when he first came home. Asked if the symptoms are as noticeable now or whether there is any difference, well I don't know very much about tuberculosis, we have never had it in our family, with any of our folks; they tell me that he is bad off with it. I have observed just his coughing and spitting blood and sputum and being down and out. He has been that way to a large degree every time I have seen him since the war.

No Cross-examination.
Witness Excused.

DR. G. D. WALLER

was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination
by Mr. Mahan.

By the WITNESS.—My name is G. D. Waller. I reside in Helena, Montana, and am a physician and surgeon, a graduate of Vanderbilt Medical School.

Mr. EVANS.—We admit the Doctor's qualifications as a [43] physician and surgeon.

I am employed now by the United States Veterans' Administration, at Fort Harrison, Montana. I know the plaintiff in this case. I have charge

(Testimony of Dr. G. D. Waller.)

of the wards, as physician. I know Harry D. McCleary. I made a physical examination of him I think it was in March, 1932. That examination was made in conjunction or consultation with the board of three, of which I am a member. This is my signature to what is a part of the clinical record. It is a part of a physical examination report in which examination I participated as a physician.

Mr. MAHAN.—Is there any objection to the Doctor testifying from that?

Mr. EVANS.—Well it is a part of the official records of the United States Veterans' Bureau and is admissible as such, but we do not want to introduce the whole thing in evidence. The Doctor can testify to such part as he is familiar with. No objection.

The report of the examination made by me is dated March 18, 1932. Using this report to refresh my memory, we found Mr. McCleary to be suffering from a far advanced active tuberculosis and a chronic pleurisy of both lungs. Asked to what degree of disability with reference to whether it is total or less than total we found existed, my answer is total. Asked what my judgment is as to the prognosis, with reference to its permanency, the chances are that it is permanent. In my judgment I would say that should continue throughout the remainder of his lifetime. I heard the testimony of all of the witnesses here in this case.

(Testimony of Dr. G. D. Waller.)

Q. Considering their testimony to be correct, what in your [44] judgment would be the nature of his condition since his discharge with reference to activity?

Mr. EVANS.—Objected to for the reason that there is no proper foundation laid for such an opinion and that it calls for a conclusion upon facts which are not within the knowledge or possession of this witness.

The COURT.—Sustained.

Mr. MAHAN.—Exception.

Exception noted.

It is not necessary that a sputum test be positive for tubercular bacilli in order to establish active pulmonary tuberculosis.

Q. Dr. Alexander testified there was pain in the chest and difficulty in respiration and dullness in one of the lungs and fever, continued fever, and he aspirated the pleural cavity and obtained a clear yellow fluid. He made a test for the presence of typhoid fever and a diagnosis of active tuberculosis. What is your judgment with reference to a diagnosis on that clinical finding?

The COURT.—You mean to ask what Dr. Waller's diagnosis would be on such findings? Is that your question?

Mr. MAHAN.—Yes, whether he agrees with it.

Mr. EVANS.—No objection.

(Testimony of Dr. G. D. Waller.)

A. The diagnosis would be doubtful, to a certain extent, but pleurisy with effusion, the vast majority of cases are tubercular.

A cardiac condition might also cause or produce that purulent clear yellow fluid which was taken from the lung; practically nothing else would, that I know of; as to whether either tuberculosis or heart trouble, heart disease, would do so, I would say [45] in the vast majority of the two, a tuberculosis would. With reference to my examination I found no other condition in this patient than tuberculosis. As to finding a cardiac affliction, well I found chronic pleurisy, which very often goes with tuberculosis. I found no heart disease.

It is possible, with active pulmonary tuberculosis, for a man to work; from a medical standpoint it is not advisable, for it would be detrimental to the patient's health; this would be true because exhaustion and worry are two of the worst things that can happen to a tuberculosis patient. Asked if a man is or is not imperiling his life by working, with active pulmonary tuberculosis, well it could not help him.

Cross-examination
by Mr. Evans.

By the WITNESS.—A great many men, by proper care and proper sanitation, work over long periods of years with active tuberculosis. In certain stages active tuberculosis is curable. There are

(Testimony of Dr. G. D. Waller.)
records of a great many cases where a man has been active for a short period of time, recover, and may carry on with his regular occupation for several years and then later have a breakdown from that disease. I do not think that this condition of the lung, found in McCleary by Dr. Alexander in 1920, could have been a pneumonia. Asked what the presence of staphylococci and streptococci, with no tubercular bacilli, would indicate to me as to the nature of that disease suffered by McCleary in 1920, I will ask where the staphylococci were found; being told that two sputums examined in Dr. Hal Bieler's laboratory, and the sputum in all cases being negative for tubercular organisms but contained staphylococci and streptococci, from the sputum, I will say that it wouldn't mean much of any- [46] thing. It wouldn't mean that he had tuberculosis and it wouldn't mean that he did not have it. As to the absence of tubercular bacilli indicating that he did not have tuberculosis, if I may answer it in this way: the presence of tubercular bacilli in the sputum is one of the positive proofs of an active tuberculosis, but the absence of it does not mean that he does not have it. Having heard the testimony of Dr. Alexander read, in the deposition, and asked if there is any positive proof in that deposition that McCleary had tuberculosis, either active or arrested, in 1920, my answer is that there are very few cases of pleurisy with effusion that are not tubercular. As to the most I would say

(Testimony of Dr. G. D. Waller.)
being that it is possible that he had tuberculosis in 1920, I would say, it is probable.

Witness Excused.

DR. JAMES D. HOBSON

was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination
by Mr. Mahan.

By the WITNESS.—My name is James D. Hobson. I reside in Missoula, and am a physician by profession, and a graduate of a recognized medical school.

Mr. EVANS.—We will admit Dr. Hobson's qualifications as a physician.

I am connected with the Veterans' Administration, being a designated examiner. I have represented the Veterans' Bureau here, medically, since 1919. The title always has not been designated examiner. I am acquainted with Harry D. McCleary, the plaintiff in this case. I have made a physical examination of him. The first examination was made some months ago, I don't [47] know exactly when. Upon that examination he, I thought, had a fibrous tuberculosis, which was active at that time; the sputum was examined and found to be full of tubercular bacilli. Comparing them with

(Testimony of Dr. James D. Hobson.)
my experience in other sputum tests, asked how much bacilli it contained, well on the examination that I made his sputum contains more tubercular bacilli, I believe, than any case I have ever seen; they just come forth in showers, apparently. I think that his condition at present is worse than it was a few months ago. I think he is totally disabled. The chances of his recovery are problematical. I think it is reasonably certain the plaintiff will continue totally disabled the remainder of his life. I have, indeed, many times made a diagnosis of active tuberculosis on clinical findings and history alone.

Dr. Alexander's sworn deposition which was read into the record, stating that the doctor examined and had the plaintiff under his observation for a short period of time in 1920, that the symptoms were fever, and continued cough with expectoration, and purulent, which in repeated examination showed negative for tubercular organisms, pain in the chest and difficulty with respiration and with breathing, a dullness in one of the lungs, that he aspirated the pleural cavity and obtained a clear yellow fluid, and that he made a diagnosis of active pulmonary tuberculosis existing at that time; that he made a test for typhoid fever which was found to be negative; that this continued during a portion of May, June and July, 1920, that is, over a period from May 16, 1920, to July 19, 1920; that during the period from May 22nd to June 12th he was

(Testimony of Dr. James D. Hobson.)

bedfast,—asked what my diagnosis would be under those findings,—I would say that in all probability he had a tubercular pleurisy with effusion. [48] If it were established in my mind to be correct that continuously since, the plaintiff has had night sweats and temperature, cough with expectoration, and later developed positive sputum, taking into consideration the condition I found when I first examined him, I think the plaintiff has probably been continuously active since 1920.

Q. And with the history of having been gassed, and influenza with three or four months hospitalization in 1918 and 1919, what would be your judgment with reference to active, since that hospitalization?

Mr. EVANS.—Objected to as an improper foundation and too speculative and the facts stated too remote for the doctor to base an expert opinion thereon.

The COURT.—I think so. Sustained.

Q. If you were told or knew that he was gassed in October, 1918, by inhaling poisonous gasses, and later, shortly thereafter developed a severe case of influenza, was hospitalized for that over a period of three or four months, and then continued cough, fever and lack of vitality, expectoration, and entirely from the time of his hospitalization up to and including May, 1920, when Dr. Alexander was called, would it be or would it not be your judg-

(Testimony of Dr. James D. Hobson.)

ment that he was active from the time of the influenza or hospitalization?

Mr. EVANS.—Objected to for the reason that it calls for a conclusion of this witness, based on a purely speculative or probable conclusion and is too remote on which to base an expert opinion.

The COURT.—Sustained.

The symptoms of active tuberculosis are loss of weight, temperature, rise in pulse rate, weakness, general lack of [49] ambition, certain physical findings in the lungs, consisting of impaired resonance with rales, and a positive sputum, are the generalized symptoms of active tuberculosis. If the evidence shows that McCleary had all of these symptoms with the exception of the positive sputum, during any period of time, as to the probability being that he was active, I will say, considering his history of influenza and his history of pleurisy with effusion, I would consider that he has been active since that time, for the reason that a great many cases of tuberculosis follow a severe influenza with pro-bronchial involvement. It is entirely possible for one with tuberculosis to work or follow an occupation; it is so possible even with active tuberculosis. It would, however, very much endanger his life to do so, I think. It is true that some individuals, suffering from active tuberculosis, can work and carry the load of working, while others cannot.

(Testimony of Dr. James D. Hobson.)

Cross-examination

by Mr. Evans.

The WITNESS.—Asked if it is possible for a man to suffer from an attack of acute active tuberculosis, have that arrested and cured and then go on without disability for a considerable period of time, I think that the majority of cases of chronic tuberculosis show periods of a rest when they are apparently not active. No one can say how long those periods of rest will be,—an indeterminate time; it depends on the personal equation and the resistance and upon the circumstances. The condition might, indeed, become arrested and stay arrested for the balance of his lifetime, and, of course any time less, ten years or five years, when he would be handicapped little or none by such disease,—that is true. Asked if pleurisy with effusion might not come [50] from some other cause than tuberculosis, I will say that there are cases of pleuritic effusions which are not tubercular but the larger majority of them are tubercular. One may have pleurisy with effusion from an injury. Pleurisy with effusion occasionally accompanies a lobar pneumonia. In a lobar pneumonia if the chest were tapped and fluid taken from it, asked what would be the nature of such fluid, well more often than not it becomes purulent, it does not remain clear. Usually in a lobar pneumonia it is infected with pneumonococcus, and that makes a moderately thick, purulent fluid.

(Testimony of Dr. James D. Hobson.)

I heard the latter portion, only, of the testimony of Dr. Alexander. Asked if there is anything in that testimony to lead to a positive conclusion that this was a case of tuberculosis or that there was any probability of it, well there is no finding of tuberculosis that we would call a pneumonic finding, but considering the history, considering the onset and the length, the character of the fluid, one would assume that in a large majority of cases that is of tuberculosis origin. Having no other evidence on which to go except the statement that the patient had suffered from more or less the same symptoms since that time, as to my not being in a position to say that he had been active ever since that date, well he may have had periods of quiet, of course. If the Government records show that he was examined in 1922 and 1921 and 1924 and 1925 and on none of those occasions was he found to have active, asked what I would say as to the presence of active, during that period, my answer is that if the examinations were competent I should say that he must have been inactive at least at periods during these examinations. Judging, then, from such [51] testimony as I have already heard, I think that no one could state positively that the plaintiff had been active, without a period of remission, since 1920, with no other evidence to go upon.

(Testimony of Dr. James D. Hobson.)

Redirect Examination
by Mr. Mahan.

The WITNESS.—I don't recall having testified that it is my belief that the plaintiff has been continuously active since he had the influenza; I think he has had tuberculosis all the time, but he may have had periods of quiescence, which occur in a lot of cases, of course; quiescence means inactive, arrested. If anything is merely in arrest it cannot be called permanently cured, of course, according to my thought.

Q. What do you mean by competent examinations?

The COURT.—Oh, I think we all understand that.

Is active tuberculosis curable?

A. Yes, sir, in some instances, if taken early enough.

The COURT.—Air and quiet and rest?

A. And peace of mind.

The COURT.—The less work a man does the more likely he is to be cured?

A. Indeed, yes, because I consider tuberculosis as a fire that is burning; he has to use all of his resources to put it out. If he is worried or has to work hard, of course, a lot of his energy is going some place where it is misdirected, of course.

Witness excused.

Thereupon at twelve o'clock noon recess was had until one-thirty o'clock p. m., when the trial was resumed. [52]

The COURT.—You may proceed.

Mr. TOOLE.—If your Honor please, the plaintiff's case is closed. We finished before lunch.

The COURT.—Proceed with the defense.

Mr. EVANS.—If it please the Court, at this time, before the plaintiff rests or closes, in order that it may not be said that they had no evidence available, we offer access to all of the files and records of the United States Veterans' Bureau to the plaintiff, or any such part thereof as he may desire, without order of Court for that purpose.

The COURT.—Well, I have no doubt if they wanted them that they would have called for them long since, as they had that right. Proceed with your defense.

Mr. EVANS.—At this time, if it please the Court, we wish to make a motion.

The burden is on the plaintiff to prove:

1. That on or before July 1, 1919, the insured was suffering from that bodily impairment alleged in the complaint;

2. That by reason of that impairment the insured was on July 1, 1919, totally disabled, that is, that it was then impossible for him to continuously carry on a substantially gainful occupation; and

3. That the conditions totally disabling the insured on July 1, 1919, were reasonably certain to

continue throughout his life from that time with the same totally disabling effect on his [53] ability to work.

The plaintiff has failed to offer any substantial evidence whatsoever that the insured was suffering from chronic, active, pulmonary tuberculosis, and has failed to show that the inhaling of poisonous gases into his lungs on October 26, 1918, was causing any disability whatsoever on July 1, 1919, and has failed to show that the influenza suffered in November, 1918, was causing any disability whatsoever on July 1, 1919, and has failed to show that by reason of tuberculosis, gassing, nervous conditions or any other causes, that the insured was on July 1, 1919, totally disabled or even partially disabled to any extent and by his own admissions and positive evidence to the contrary has offered substantial proof that he had no impairment of mind or body which rendered it impossible for him to carry on a gainful occupation from July 1, 1919, for six months thereafter.

The plaintiff has failed to offer any substantial proof that these disabilities alleged in the complaint were reasonably certain to continue throughout his lifetime after July 1, 1919, with a totally disabling effect on his ability to work, and has offered positive proof that such total disability in fact did not exist for years when his ability to follow a gainful occupation was proved by his having followed such gainful occupation year after year. [54]

The plaintiff having failed to offer substantial evidence in support of these three requisites of proof, and assuming that all of the evidence submitted by the plaintiff is true, the defendant now respectfully moves the Court that a verdict be directed in favor of the defendant, reserving, however, the right to produce evidence on behalf of the defendant and to renew this motion at the close of all of the evidence.

It has been adjudicated that tuberculosis as such is not proof of total disability, but that each case of tuberculosis must be judged on its own merits.

By the COURT.—I think that the Court will reserve the right to proceed, with this in mind, and your motion may be renewed at the end of the defendant's case. Pro forma the motion is denied.

And thereupon the defendant introduced the following evidence in support of its case in chief:

DR. HERBERT C. WATTS

was called as a witness on behalf of the defendant and having been first duly sworn testified as follows:

Direct Examination
by Mr. Evans.

By the WITNESS.—My name is Herbert C. Watts. I am a physician by profession. I am a specialist on public health and tuberculosis. I now occupy the position of manager of the Veterans' Administration of the State of Montana, which [55] management includes the hospital. I am also head of the hospital at Fort Harrison. As such manager

(Testimony of Dr. Herbert C. Watts.)

I have in my possession and control the records of the plaintiff, McCleary, in the matter of compensation and insurance. These are all of the records of the United States, the defendant in this action, pertaining to the case of McCleary.

I heard the deposition read this morning concerning treatment by Dr. Alexander of McCleary in 1920. I have in the files the record of a physical examination made by Dr. Bieler pertaining to that particular period of illness. Exhibit 1, shown me, bearing date of June 19, 1920, and August 3, 1920, consists of examination reports submitted regularly in the course of business of a department of the United States Government, and said reports are a part of the official records of the file of the plaintiff McCleary.

Mr. EVANS.—We offer in evidence Exhibit 1.

Mr. TOOLE.—To which we object, if your Honor please, because in the first place it is hearsay, being a document under which plaintiff is deprived of the right to cross-examine. In the second place it is incomplete, it fails to show the character of the examination in full, it fails to show to what extent an examination was made for the purpose of determining this particular disability. In the third place it is incompetent because it is not a record which is kept under seal and does not bear the seal of any department of the United States Government, and in the fourth place it is not shown, does not appear from that document, as to whether or not the per-

sons who made the exami- [56] nations were qualified as physicians; there is no evidence in the record to show who they were or what kind of doctors or what qualifications they had.

The COURT.—Have you any authority to support this?

Mr. EVANS.—If it please the Court, Long v. United States, Circuit Court of Appeals, 4th Circuit decision June 13, 1932, upholds the admissibility of government records and particularly of examining physicians, in the long opinion which is the 59th Federal, 602. The reasoning is well taken and the objections offered by counsel are all met by that decision and they are held as admissible.

The COURT.—Let's see your case. Was there a report made like this one long after discharge or during the * * *

Mr. EVANS.—* * * They were made after discharge, if it please the Court.

Mr. TOOLE.—May I add to the objection that this particular document has not been properly identified, and the custody of it, the proper custody, has not been shown during any of this time.

The COURT.—The statutes of the United States provide for these examinations by doctors in the service of the government, and to whom the claimant or the insured soldier can have access for the purpose of examination in presenting his claims and the like for compensation or other insurance. This plaintiff testified he had been examined by this doctor, when he himself was on the stand, is

[57] my recollection, and now it is produced, the record of that examination, from amongst the records of the United States, that is to say, of the Veterans' Bureau. There are presumptions attaching to the validity of records thus produced, that they have been properly kept and are of themselves genuine. Accordingly the government is entitled to introduce this and the plaintiff would be,—I am not sure that it is of any particular prejudice to either party, as far as that goes,—and the objection will be overruled.

Mr. TOOLE.—Note an exception.

Exception noted.

And thereupon was received in evidence, over the objection, the Defendant's Exhibit 1, being in words and figures as follows to wit:

Defendant's Exhibit 1.

Report of Physical Examination.

Twin Falls, Ida.,
June 19, 1920.

1. Name Harry D. McCleary (C—pending.) Army Serial No. 82273.

2. Rank and Organization, Pvt. 169 Inf.

3. Age 23. Nativity Iowa. Sex M. Race W. Married..... Single, Yes. Widower..... Divorced .....

4. Previous occupation, Farmer.

5. Present Address, Route 3.

6. Permanent Address, Twin Falls, Ida.

7. Brief military history of claimant's disability: Inducted March 29, 1917, in good health. Was at the [58] front with the Rainbow Div. for nine months, and during that time he was gassed three times but never reported to hospital for same. Had several attacks of acute tonsillitis and was partially shell shocked several times. Memories full of ghastly horrors. Gassed slightly and had the flu during the Argonne drive and was at Base 216 Nance for two months and recommended for discharge. Had tonsillectomy on boat coming home. Was never considered a lung case. No venereals.

Date of discharge May 9, 1919.

8. Present complaint: Cough, loss of weight, shortness of breath, pains in left chest at night, expectoration, pains in shoulders, arms and fingers.

9. Physical examination: A thin nervous looking boy, fairly well developed, head, neck, abdomen and genitals normal. Heart negative, blood pressure S-120, D-80. Lungs show moisture throughout and bronchial breathing at right apex, and cog wheel breathing at right base. Dullness at left base, where 30 cc. of clear yellow fluid was tapped two weeks ago. Small effusion still present. Sputum very vicid and negative for T. B., but contains many eosinophile cells and Curshman spirals. Urine, normal. Bronchial asthma 127. Pleurisy, chronic fibrous with effusion. 969. (Possibly T. B.)

10. Diagnosis.....

11. Basis for diagnosis, examination.

12. Complication, sequela, etc. General weakness.

13. Where was sickness or disability incurred? France.

14. How incurred? Gas and exposure.

15. Disposition, examined.

16. Condition on disposition, bad.

17. Prognosis, questionable. [59]

18. Is claimant able to resume former occupation? No.

19. Do you advise it? No.

20. Is claimant bedridden? Partly.

21. Is claimant able to travel? Yes.

22. Do you advise hospital care? No.

23. Will claimant accept hospital care? Yes.

24. In your opinion is disability due or traceable to service? Yes.

25. The claimant has a vocational handicap which is: Major.

26. Is his physical and mental condition such that vocational training is feasible? No.

27. Remarks: This case has been treating with a private doctor. The boy tried to work three weeks ago, and the pleural effusion followed. He has been in bed the last three weeks, and is now up, and has no fever. Seems to be gaining weight. It is dangerous for this man to try to work for some time. He can follow all necessary treatment at home.

Hal Bieler, D. E.,
Surgeon U. S. P. H. S.

REPORT OF PHYSICAL EXAMINATION.

Twin Falls, Ida.,
Aug. 3, 1920.

1. Name Harry D. McCleary. (C—435834.) Army Serial No. 82273.

2. Rank and Organization, Pvt. 169 Inf.

3. Age 23. Nativity..... Sex..... Race W. Married..... Single..... Widower..... Divorced .....

4. Previous occupation, Farmer.

5. Present Address, Route 3 Twin Falls, Ida.

6. Permanent Address ..... [60]

7. Brief military history of claimant's disability:

Inducted March 29, 1917, in good health. Was at the front with the Rainbow Div. for nine months and during that time he was gassed three times but never reported to hospital for same. Had several acute attacks of tonsillitis, and was partially shell shocked several times. Memories full of ghastly horrors. Gassed slightly and had the flu during the Argonne drive and was at Base 216 Nance for two months, and recommended for discharge. Had tonsillectomy on boat coming home. Was never considered a lung case. No venereals. In April, 1920, after trying to work, has pleurisy with effusion, left base, and was tapped twice, 30 cc. clear yellow fluid obtained at second tapping. Lost about 40 pounds at that time. Made a very slow recovery, and has gained 10 pounds of this weight back.

Date of discharge, May 9, 1919.

8. Present complaint: Slight cough, weakness, pain in the right shoulder.

9. Physical examination: A thin, nervous looking boy, fairly well developed. Head, neck, abdomen, genitals and extremities apparently normal. Heart normal, rate 100, blood pressure S-110, D-70, right lung normal. Left shows dullness at base posterior, but no signs of fluid. Probable thickened pleura. There is apparent atrophy of the left chest, which has a circumference of three cm. less than right chest. Left apex shows crepitant rales throughout, but no impaired resonance. Sputum negative for T. B. Urine, normal.

10. Diagnosis, bronchial asthma. 127. Pleurisy, chronic fib. 969. Thickened at left base.

11. Basis for diagnosis, examination and history. [61]

12. Complication, sequela, etc. None.

13. Where was sickness or disability incurred? France.

14. How incurred? Gas and exposure.

15. Disposition. Examined.

16. Condition of disposition. Weak, but improving.

17. Prognosis. Uncertain.

18. Is claimant able to resume former occupation? No.

19. Do you advise it? No.

20. Is claimant bedridden? No.

21. Is claimant able to travel? Yes.

22. Do you advise hospital care? No.

23. Will claimant accept hospital care? Yes.

24. In your opinion is disability due or traceable to service? Yes.

25. The claimant has a vocational handicap which is: Major.

26. Is his physical and mental condition such that vocational training is feasible? No.

27. Remarks: Prolonged rest, to be continued for at least 60 days.

Hal Bieler, D. E.,
Surgeon U. S. P. H. S.

(Testimony of Dr. Herbert C. Watts.)

The WITNESS.—Exhibit 2, shown to me, is known colloquially as Form 526. It is the application which a person makes when he requests compensation. I heard the testimony of the plaintiff this morning, in which he admitted that this is his signature, on the document here which was then referred to; this is that same document.

Mr. EVANS.—We offer in evidence Exhibit 2.

Mr. MAHAN.—We have no objection. [62]

Thereupon was received in evidence without objection the instrument referred to, being as follows, to wit:

DEFENDANT'S EXHIBIT 2.

APPLICATION OF PERSON DISABLED IN AND DISCHARGED FROM SERVICE.

(Here follows printed instructions—not copied.)

1. Full name, Harry D. McCleary.

2. Address, Route No. 3, Box 85, Twin Falls, Idaho.

3. Under what name did you serve? Harry D. McCleary. (a) Serial No. 82273.

4. Color, white. Date of birth, March 9, 1897. Place of birth, Winterset, Iowa.

5. Make a cross (X) after branches of service you served in: General service (X).

6. Date you last entered service, March 29, 1917. Place of entry, Miles City, Mont.

7. Rank or rating at time of discharge, private.

8. Company and regiment or organization, vessel or station in which or on which you last served: Co. Hq. 168th Inf.

8a. Give fully any other service in the military or naval forces, stating rank and organization. No other.

9. Date and place of last discharge. May 9, 1919, Fort D. A. Russell, Wyo.

10. Cause of discharge, Circular 106 W. D. 1918.

11. Nature and extent of disability claimed. Trouble with lungs. Has been able to work only part of time since discharge.

12. Date disability began. For the last four or five months.

13. Cause of disability. Gas, influenza and exposure.

14. When and where received. Had influenza October, 1919, Capt. W. H. Nead commanding. Gassed in April, 1918, on the Lorainne front. Gassed in October, 1918, on the Argonne front. [63]

15. Did you receive treatment at an army hospital? Yes. (a) If so, state name and location of the hospital. Base Hospital 216, Nantes, France. Also in hospital on way back to U. S. and in Naval Hospital, Charleston, S. C.

16. Occupations and wages before entering service: Farming for father and living at home.

17. Last two employers before entering service: Worked for father.

18. Occupation since discharge, dates of each, and wages received. If less than before, why? Farming May, 1919—July, 1919, $75.00 per mo. Carpenter trade July, 1919, for two weeks.

19. Present employer: Not working.

20. Name and address of attending physician: Dr. D. Alexander and Dr. Bieler, both of Twin Falls, Idaho.

21. Are you confined to bed? Part of time. Do you require constant nursing or attendance? No.

22. Name and address of nurse or attendant? None. Sick at home.

23. Are you willing to accept medical or surgical treatment if furnished? Yes.

24. Are you single, married, widowed or divorced? Single.

25. Times married. x x

26. Date and place of last marriage. x x

27. Times present wife has been married. x x

28. Maiden name of wife. x x

29. Do you live together?

30. Have you now living a child or children, including stepchildren and adopted children, under 18 years of age and unmarried? x x

31. If so, state below full name of each child and date of [64] birth; if a stepchild or adopted child, so state and give date stepchild became a member of your household or date adopted child was adopted by you. x x

32. Have you a child of any age who is insane, idiotic or otherwise permanently helpless? x x

33. State whether your parents are living together, separated, divorced or dead. Living together.

34. Give name and address of each parent living. W. Edgar Milton McCleary, R. F. D. 3, Twin Falls, Idaho. Lorinda J. McCleary, same address.

35. Age of mother, 43. Age of father, 53.

36. (a) Is your mother now dependent on you for support? No.

(b) Is your father now dependent on your for support? No.

(c) If so, give your average monthly contribution to your mother, $00; your father, $00.

37. (a) Value of all property owned by your mother, $00; your father, $12,000.

(b) What is the monthly income of your mother, $00; your father, $150.00.

38. Did you make an allotment of your pay? No.

39. If so, to whom? x x

40. Give number of any other claim filed on account of this disability and place where filed. No other.

41. Did you ever apply for War Risk Insurance? Yes.

(a) When and where? Dec., 1917, Camp Mills, N. Y.

(b) Insurance certificate number. Unknown.

42. Name of beneficiary? Lorinda J. McCleary.

I make the foregoing statements as a part of my claim with full knowledge of the penalty provided for making a false statement as to a material fact in a claim for compensation or in- [65] surance.

Harry D. McCleary.

Subscribed and sworn to before me this 18th day of June, 1920, by Harry D. McCleary, claimant, to whom the statements herein were fully made known and explained.

[Notarial Seal] Henry J. Wall,
Notary Public.

We, the undersigned, severally solemnly swear that we have know the claimant whose name is subscribed above, six years, and that we have read the statements made by him, and the facts stated are true to the best of our knowledge and belief.

S. Ralph Klein, 130 Jefferson Ave., Twin Falls, Ida.

Andrew S. Betzer, 408 Elm St., Twin Falls, Ida.

Subscribed and sworn to before me this 18th day of June, 1920.

[Notarial Seal] Henry J. Wall,
Notary Public.

Mr. EVANS.—Mr. Mahan, will you look over this copy of the discharge and tell me if you have any objection to that being admitted instead of the original. The original is in the possession of the plaintiff and this is merely a copy.

(Testimony of Dr. Herbert C. Watts.)

The WITNESS.—Exhibit 4, handed me, and consisting of ten sheets, are records of the United States Veterans' Administration. These are medical follow-up reports executed by what is known as the follow-up nurse; they are part of the official records of the Veterans' Administration.

Mr. EVANS.—We offer Exhibit 4.

Mr. TOOLE.—We make the same objection we made to the [66] other, and in addition the objection that they appear to have been made by the follow-up nurse whose qualifications do not appear

(Testimony of Dr. Herbert C. Watts.)

at all, and they have not been properly identified as records of the government; their custody has not been shown during a period of years.

Mr. EVANS.—I might limit our offer on that, if it please the Court, only to that portion of those reports which refer to his physical condition on the date given. I think that is all that is really admissible.

The COURT.—Well, who is the one that signed here,—J. H. Hofgard, manager?

Mr. EVANS.—They are signed, both by a nurse and by a supervisor, if it please the Court. Some of them may not be signed by a nurse. I haven't examined them carefully, but we offer those that are signed by a registered nurse only. If I inadvertently included some I will withdraw them; in any event I will not use them.

Mr. TOOLE.—Well, they are further objected to for the reason that there is nothing to show the person who signed them is qualified.

The COURT.—This seems to be while he was in training at this store, advertising sign company.

Mr. EVANS.—I think possibly that first one is, but that report is originally used by nurses.

The COURT.—I don't think these are entitled to admission. The objection will be sustained to these.

Mr. EVANS.—May we have an exception? [67]

The COURT.—You may have it.

Exception noted.

(Testimony of Dr. Herbert C. Watts.)

The offer of Defendant's Exhibit 4 was by the Court denied.

Mr. EVANS.—We offer Exhibit 3, which purports to be a copy of the honorable discharge from the United States Army of Harry D. McCleary.

Mr. TOOLE.—No objection.

The COURT.—Very well.

Thereupon without objection was received in evidence the instrument referred to, identified as and marked Defendant's Exhibit 3, and as follows:

DEFENDANT'S EXHIBIT 3.

U. S. Army Recruiting Station, Twin Falls, Idaho. This is to certify that one bronze "Victory Button" has been issued. Frank C. Bird, Capt. F. A., U. S. Army.

Pay Claim No. 52854-M, filed office Director of Finance, War Dept., for settlement Dec. 23, 1919.

ENLISTMENT RECORD.

Name, Harry D. McCleary. Grade, Pvt.

Enlisted 3-31-1917 at Miles City, Mont.

Serving in first enlistment period at date of discharge.

Prior service. None.

Non-commissioned officer. Never.

Marksmanship, gunner qualification or rating. Not qualified.

Horsemanship. Not mounted.

Battles, engagements, skirmishes, expeditions: Loraine 3-13, 6-19-1918; Champagne 7-15-20-18; St. Mihiel 9-12-26-18; Argonne 10-13-26-18; C. Thiery 7-23-29-18.

Knowledge of any vocation. Farmer.

Wounds received in service. None. [68]

Physical condition when discharged. Good.

Typhoid prophylaxis completed 4-10-17.

Paratyphoid prophylaxis completed 11-8-17.

Married or single. Single.

Character. Excellent.

Remarks: Service, honest and faithful. No A. W. O. L. or absence G. O. 31 W. D. 1912 and G. O. 45 W. D. 1914.

Entitled to travel pay to Miles City, Mont.

Signature of soldier.....

C. R. Farmer,
1st Lieut. A. G. D.
Asst. Par. Adj. Commanding.

$60.00 bonus, Section 1406 of the Revenue Act of 1918, approved February 24, 1919. Paid Fort D. A. Russell, Wyo., May 9th, 1919. Paid in full $112.06. BASIL G. SQUIER, Major Q. M. C.

(I hereby certify that the above is a true copy, discharge of Harry S. McCleary. R. C. Letsch, Notary Public.)

HONORABLE DISCHARGE FROM THE UNITED STATES ARMY.
TO WHOM IT MAY CONCERN:

THIS IS TO CERTIFY, That Harry D. McCleary A. S. 82273 Pvt. Headqrs. Co. 168 Inf. THE UNITED STATES ARMY, as a TESTIMONIAL OF HONEST AND FAITHFUL SERVICE, is hereby HONORABLY DISCHARGED from the military service of the UNITED STATES by reason of Circular 106 W. D. 1918.

Said Harry D. McCleary was born in Booneville in the State of Iowa.

When enlisted he was 19 years of age and by occupation a farmer.

He had brown eyes, brown hair, fair complexion, and was 6 [69] feet 0 inches in height.

Given under my hand at Fort D. A. Russell, Wyo., this 9th day of May, one thousand nine hundred and .....

H. C. Smith,
Commanding.
R. G. White,
Contact Officer, Dist. No. 13.

A true copy of a certified copy.

(Testimony of Dr. Herbert C. Watts.)

The WITNESS.—Exhibit 5 is a part of the records of the United States Veterans' Administration, and is known as the physical examination report. This was made by Dr. C. H. Sprague, of Pocatello,

Idaho, December 10, 1921. It included a third sheet, which is a correction thereon, also signed by Dr. Sprague.

Mr. EVANS.—We offer Exhibit 5.

Mr. MAHAN.—Well, your Honor, we object to that for all of the reasons we have stated in our preceding objections; for the further reason that it is not an original record but is a typewritten copy of a record which does not appear to have been signed, —oh yes,—but we further object, and particularly object to page 3 because it contains statements of conclusions which are not based on anything in the record in this trial and is extremely prejudicial.

Mr. EVANS.—We are not offering that portion written by anyone or signed by anyone but Dr. Sprague; it is a portion of a letter, to which he replied on the same page.

Mr. MAHAN.—Well, it has all the objections that were offered, then, to the other documents. Also add the objection that it is not shown that Dr. Sprague [70] was or that he had any connection at that time with the Veterans' Bureau.

Mr. EVANS.—Dr. Sprague, if it please the Court, is the same doctor referred to by the plaintiff in his testimony this morning, as the doctor at Pocatello, Idaho, who examined him, and whom the plaintiff admitted examined him. The Court will recall that I interrupted him and changed the name at that time.

The COURT.—Who is this Dr. Sprague?

(Testimony of Dr. Herbert C. Watts.)

Mr. EVANS.—An examining * * *

The COURT. * * * Do you know?

A. Not personally, no, sir, but from the document there, he was what was known as the designated examiner at that time; you see the signature, "U. S. P. H. S.", because at that time all of the physicians were under the Public Health Service.

The COURT.—Well, under the ruling heretofore made it is admissible.

Mr. MAHAN.—You didn't offer that third page, did you?

Mr. EVANS.—Not that portion of the third page written by someone else, but that portion written by Dr. Sprague, at the bottom.

Mr. MAHAN.—Well, I think the third page should be excluded on the ground that he is only offering a part of a written exhibit; certainly the first part of it is not admissible.

The COURT.—What is the date of this one? December 10, 1921?

Mr. EVANS.—Yes, your Honor. We believe the letter to Dr. Sprague is really admissible as part of [71] that same examination, as it is a discussion of the findings of the examination and a part of the record of that examination.

The COURT.—I think if I were plaintiff's counsel I should want that to go in. You object to this third page?

Mr. MAHAN.—Well, I would like to see it. I had very little time to read it. If it has anything in

(Testimony of Dr. Herbert C. Watts.)

it that helps us, of course, we would like to have it go in. We withdraw our objection.

The COURT.—Very well, it will be admitted.

The document, Exhibit 5, was thereupon received in evidence, and is as follows:

DEFENDANT'S EXHIBIT 5.

REPORT OF PHYSICAL EXAMINATION.

(Printed instructions for filling out report not copied.)

C. No. 435,834.

Place: Pocatello, Idaho.

Date: December 10, 1921.

1. Claimant's name McCleary, Harry De Witt, S., M., W., D.

2. Service, rank, organization; date of induction and military discharge: Pvt. Co. Hq. 16th Infty. Date of discharge: May 9, 1919.

3. Present address: Twin Falls, Idaho.

4. Age, 24.

5. Color, white.

6. Principal prewar occupation, farmer.

7. Medical and industrial history since military discharge: Any acute intercurrent illnesses? Treated by what physicians? When? In what hospitals? When? Where? Employed continu- [72] ously? Where? When?

Brief military history: Enlisted March 29, 1917, at Miles City, Mont., Co. E, 2nd Mont. unit

changed to 163rd Infty., with which overseas Dec. 14, 1917; in France transferred to above unit; partook of Lorraine, Champagne, Chateau Thierry, St. Mihiel, Argonne; gassed Oct. 23, 1918, to B. H. 216, where remained about four months; had "flu" while in hospital for gas; also had tonsillitis and abscess of jaw with tonsillectomy while en route home; arrived U. S. Apr. 16, 1919, to Naval Hospital at Charleston with tonsillitis about a week; to Ft. Russell, where discharged in good physical condition; no other sickness while in service; no dental work done; no accidents, injuries nor operations.

History prior to service: Measles and whooping cough in childhood; no scarlet fever nor diphtheria; no pneumonia nor smallpox; no typhoid; no other fever; had tonsillitis about every winter; no rheumatism; no dyspnea nor edema; no continued cough nor hemoptysis; no alimentary disturbances, piles nor jaundice; no urinary disturbances nor venereal disease; no nervous nor mental trouble; had some mild "bilious headaches," which ceased in service; no trouble with eyes or special senses aside from occasional tonsillitis; no dental work done; no accidents, injuries nor operations; no trouble with bones, joints nor skin; lived principally in North Dakota and followed above occupation.

Family history: Father 58, has "stomach trouble"; mother 49, well; two brothers, two sisters, well; one brother died, meningitis; no history of tuberculosis, syphilis, malignancy, diabetes, nerv-

ous nor mental diseases; father has sick headaches; no consanguinity. [73]

History after service and present illness: Gas bothered principally in lungs while in hospital, slight cough and pains in chest; was apparently in good condition upon leaving service, though was slightly under weight; had some cough which was slightly productive in mornings and at no other time of the day; was not sick but "didn't feel like working" during the past year out of service; in June, 1920, developed pneumonia and empyema and was sick in bed two weeks ("drew pus out of chest twice with a needle"); was awarded total disability which continued until

8. Subjective symptoms:

October, 1920, when started vocational training, which continued until Sept. 1, 1921; during this time lost some weight, but felt well; had slight cough and upon examination training was discontinued, following an X-ray and other study of chest at Boise Hospital; since that time has been doing nothing as has been awarded total disability again.

Present complaint: Coughs up a little gray substance in the mornings, especially if has a cold, and will also cough at other times during the day, but not very much; feels weak and nervous; has had no fever of which he knows; has never had night sweats; eats very well, though sleeps rather poorly, staying awake several hours each night; is about 15 pounds below normal weight; sometimes when goes to bed can hardly get his breath.

9. Physical examination: 72 inches tall; weighs 160 lbs., which is about 15 lbs. below normal; highest during past year 165, in Jan., 1921; lowest during past year 154 lbs. in Oct., 1921; well developed, fairly nourished, good complexion; seems rather "hollow eyed" and anxious; temperature, 98.4.

Scalp and calvarium: Normal. [74]

E. E. N. T. report of specialist: "Eyes R. 20/20, L. 20/20, Ears R. O. K. normal hearing. L. O. K. normal hearing. Nose: Deflected septum. Naso pharyngeal catarrh. Throat: Tonsils enucleated, 3 yrs. J. Clothier."

Teeth: Dental report: Caries present Nos. 1-2-15-18-30-31. Salivary deposits, Gingivitis. Balance of teeth apparently normal. A. M. Jacobsen."

Lymphatics: Cervical nodes slightly enlarged equally bilaterally.

9. Physical findings: (Claimant must be stripped.) For tuberculosis examination see page 4. If an X-ray examination has been made, give the date, place and authorship of the radiogram.

Lungs: Chest is full, fairly developed and muscled, slightly drooping shoulders, s. c. spaces slight depressed equally bilaterally; expansion is good, though seems to be slightly less on left; 32½-37; some lagging of left chest; fremitus seems to be slightly diminished upper left posteriorly; resonance normal and equal throughout; auscultation shows slightly increased inspiratory harshness lower left posteriorly into left axilla, slightly cog-wheel in character; no other adventitious sounds

nor rales demonstrable on normal nor deep breathing nor following expiratory cough, with special and repeated attention to apices, axillae and other points of election (claimant has an acute rhinitis at present).

Circulatory: Heart, p. m. i. 9 c. m. m. l. s. 5 i. s. well outlined to inspection and palpation, no thrill, regular, 88, cardiac dullness 9 c. m. m. l. s.; auscultation shows both sounds at p. m. i. of fair quality, no murmur, regular, A2 equals P2. Blood pressure sitting 126-80, standing 138-94, no dyspnea, edema, [75] cyanosis nor congestion. After exercise pulse 100, 1″ 92, 2″ 86, no remarkable nor continued dyspnea, edema, cyanosis nor congestion.

Digestive: Tongue clean, moist; abdomen flat, well muscled, no lasses, hernia, hemorrhoids nor points of tenderness.

Vision—(Snellen chart)—Uncorrected R. 20/20, L. 20/20. Corrected by claimant's glasses R. 20/, L. 20/.

Hearing—(spoken voice)—R. 20/20, L. 20/20.

G. U. No scars nor varicocele, epididymis normal; urine, normal.

Nervous: Cranial nerves normal; station and gait normal; no tremor nor clonus; reflexes: bi., Abd., Crem., normal and equally active bilaterally; KJ and Ach. greatly exaggerated equally bilaterally.

Bones and joints: First degree flat foot, which is bothersome.

10. Diagnosis: Prognosis: Good.

Acute Rhinitis 1041.

Pes Planus (symptomless) 952.

(No evidence of existing nor previous pulmonary involvement.)

Dental Caries 182.

Gingivitis 475.

11. Is claimant able to resume his prewar occupation? No.

12. Is claimant bedridden? No. Able to travel? Yes. Unattended? Yes.

13. Do you advise hospital care? No. Will claimant accept hospital care? Yes.

14. Has claimant a vocational handicap? (See par. 14, "Instruction.") Minor. [76]

15. Is his physical and mental condition such that training is feasible? Yes.

Name C. H. Sprague, M. D. Title P. A. S. (R) USPHS. Address Pocatello, Ida.

TO BE FILLED OUT IN DISTRICT OFFICES.

This report is in response to U. S. Veterans' Bureau request of Oct. 29, 1921.

In my opinion the disability is.....due to service. Training is.....feasible. The applicant has.....a vocational handicap. Follow-up report is.....necessary every..... days.

This claimant was hospitalized in.....
Hospital, commencing (date).....
Date.....
.....District Medical Officer.
District No.....

SPECIAL TUBERCULOSIS REPORT.

(In cases of suspected pulmonary tuberculosis, the following information must be furnished in addition to other data in this report.)

Height, with shoes, 72 inches. Weight (without coat) 160. Did you weigh the man yourself? No. Normal 175. Highest (lbs.) 165, Jan., 1921. Lowest (lbs.) 154, Oct., 1921. Sputum: Positive or negative? Negative. If negative, how many specimens were examined? None.

EXAMINATION OF CHEST.

Shape: Full, fairly developed, slightly drooping shoulders.

Mobility: S. c. spaces very slightly depressed. Expansion is good, though seems to be a little less on left.

Palpation: Fremitus: Fremitus seems to be slightly diminished upper left posteriorly. [77]

Percussion: R. lung: Resonance normal and equal bilaterally. L. lung:

Auscultation: R. lung: Auscultation shows slightly increased inspiratory harshness lower left posteriorly into left axilla, slightly cogwheel in

character; no other adventitious sounds nor rales demonstrable on normal nor deep breathing nor following expiratory cough.

L. lung:

Summary: Here indicate areas of infiltration, consolidation, etc., lobe by lobe:

No evidence of existing nor previous pulmonary involvement.

Diagnosis: ~~Tuberculosis, chr. pulmonary (?) 1241.~~ Arrested.

Classification (National Tuberculosis Association standards):

Condition.—Active, quiescent, apparently arrested, or arrested. (Underscore the condition found.)

Stage.—Incipient, moderately advanced, or advanced. (Underscore the stage found.)

Name of examiner: Dr. C. H. Sprague, M. D. Address Pocatello, Idaho.

(VETERANS' BUREAU.)

Office of District Manager District No. 13.

UNITED STATES VETERANS' BUREAU.

Seattle, Wash.

January 5, 1921.

Harry D. McCleary
C-435834
Twin Falls, Idaho.

C. H. Sprague,
P. A. Surgeon, USPHS,
Pocatello, Idaho.

Sir:

1. Reference is made to report of physical examination [78] dated December 10th, of the above named claimant, in which a diagnosis of tuberculosis, chronic, pulmonary, is made. The evidence as submitted is insufficient for this diagnosis, and you are requested to make the necessary correction and expedite return of the examination to this office.

Respectfully,

L. C. Jesseph,
District Manager.
By Paul I. Carter,
Surgeon (R) USPHS,
District Medical Officer.

First Indorsement.

To District Manager, attention District Medical Officer, Seattle, Washington, from Local Medical Officer, Pocatello, Idaho, Jan. 23, 1922.

1. I am returning herewith physical examination of above named claimant. You will note corrections made as per your request.

Respectfully,

Dr. C. H. Sprague,
P. A. S. (R) USPHS.

The WITNESS.—Exhibit 6 is a part of the records of the United States Veterans' administration. It is the certificate from Dr. Blair, San Jose, California, under date of September 3, 1924.

Mr. EVANS.—We offer Defendant's Exhibit 6.

Mr. MAHAN.—No objection.

And thereupon without objection was received in evidence the instrument identified as and marked Defendant's Exhibit 6, as follows: [79]

DEFENDANT'S EXHIBIT 6.

DR. J. C. BLAIR

801 First National Bank Building
San Jose, Cal.

September 3, 1924.

To all concerned:

This is to certify that Mr. Harry D. McCleary was under my medical care from September 5, 1923, until October 1, 1923. He was suffering with pleurisy and rheumatism.

J. C. Blair.

(Testimony of Dr. Herbert C. Watts.)

The WITNESS.—Exhibit 7 is a part of the official records of the United States Veterans' Administration in the case of Harry D. McCleary, being the Report of Physical Examination made in San Francisco, California, by Dr. Martin J. Seid, May 23, 1924. I know Dr. Seid personally, and know his signature. I know him to be a qualified physician, he was one of the T. B. experts of the San Francisco office when I was District Medical Officer. He was working under my supervision. I know that the whole report, except for the form part, is in his own handwriting.

Mr. MAHAN.—We make the same objection to that that we made to the first exhibit.

The COURT.—Well, for the reasons heretofore given,—this is the record of the United States, and it is entitled to all presumptions of regularity,—the objection will be overruled.

Mr. MAHAN.—Exception.

Exception noted.

The COURT.—Is there a date on this document at all?

Mr. EVANS.—Isn't the date at the head of it? For [80] convenience I penciled the date at the top. The date is in the body of it somewhere.

The COURT.—Well, I don't see any date anywhere, but it identifies the time by stating where he was employed.

Mr. EVANS.—If it please the Court the date is in answer to question 22 on the top of the page there.

Thereupon, over the objection, was received in evidence the instrument referred to, identified as and marked Defendant's Exhibit 7, and as follows:

DEFENDANT'S EXHIBIT 7.

REPORT OF PHYSICAL EXAMINATION.

C. No. 435834.

1. Claimant's name: McCleary, Harry D. M.

2. Service, rank and organization: Pvt. 168th Inf.

3. Present address: 165 Turk St., San Francisco, Calif.

4. Age 27.

5. Color W.

6. Principal prewar civil occupation: Laborer.

7. Date of induction: 3/30/1917.

8. Date of discharge 5/9/1919.

9. Brief history of claimant's disability during service: Was "gassed" in 1918. Influenza. Hospitalized for 9 months. Regular discharge.

Medical and industrial—since discharge. (Use reverse side.)

10. Present complaint (subjective symptoms, not diagnosis): No cough, no expectoration, has night sweats—pains in chest—appetite good—is losing a little weight—stomach o. k.—bowels constipated—tires easily—feels feverish in P. M.

11. Physical examination: (Claimant must be stripped. For tuberculosis examination use other side. If an X-ray examination [81] has been made,

give the date, place, authorship and interpretation of radiogram.)

Well built, fairly well nourished, skin clear, good color.

Pupils equal, react to light and accommodation, no exophthalmos.

Teeth good, pharynx normal. Thyroid—not palpable—no tremors—no glandular enlargement. Pulse 76, regular in force and rhythm—heart—A C D within normal limits—heart sounds clear—no palpable thrill. Blood pressure—112/70. Abdomen and genital—negative. Wasserman—negative. X-ray—see report. Urine—negative.

Vision (Snellen chart): Uncorrected R. 20/, L. 20/. Corrected by glasses: R. 20/, L. /20.

Hearing (spoken voice): R. /20, L. /20.

12. Diagnosis: No pulmonary pathology found.

13. Prognosis: Good.

14. Is claimant able to resume his prewar occupation, in your opinion? Yes.

If not, state why.....

15. Is claimant bedridden? No.

16. Is claimant able to travel? Yes.

17. Do you advise hospital care? No.

18. Will claimant accept hospital care? Yes.

19. Is an attendant necessary? No.

20. Is his physical and mental condition such that vocational training is feasible? Yes.

21. Did you examine the man yourself on this date? Yes.

22. Place: U. S. V. B., S. F., Cal. Date: May 23, 1924. Name: M. J. Seid, M. D. Title: Asst. Surg. (R.)

Medical and industrial history since discharge: [82]

Any acute intercurrent illness? Yes—bronchopneumonia in 1921, followed by empyema.

Names of all physicians who have treated claimant Dr. Alexander at Twin Falls, Idaho, in 1921. When? 1921.

In what hospitals, when and where? None.

Employed continuously? No. When and where? .....

Employed at present? Yes. Amount of wages per month $135.00.

Name of employer: Pomovin Corset Co., 951 Market St.

Nature of employment: Window trimmer and show card writer.

Amount of time lost on account of sickness: Two years.

Nature of disease: Chest trouble.

If not employed at present, why? .....

Any additional remarks? .....

SPECIAL TUBERCULOSIS REPORT.

(In cases of suspected tuberculosis, the following information must be furnished in addition to the report on the other side of the sheet.)

If the man has been treated since discharge from military or naval service, give the name and address of hospital or physician, with dates, and the disability for which he was treated. In recording the physical examination use form below, filling in all blanks carefully:

Temperature 98 deg. F. Pulse 76. Time of examination 2:00 P. M.

Height, with shoes, 73 inches. Weight (without coat) 170½. Did you weigh the man yourself? Yes. Normal 175. Highest 175 (2 mos. ago) lbs. Lowest 165 lbs. (6 mos. ago). Sputum (positive or negative) not obtainable. If positive, how many specimens were examined? [83]

EXAMINATION OF CHEST.

Shape: Long, flat over upper part. Mobility: Both sides move freely and equally.

Palpation: Fremitus: Increased over right side.

Percussion: R. lung: DR over apex only. L. lung: No impairment.

Ascultation: R. lung: Harsh breath sounds over upper lobe. No rals. L. lung: Breath sounds normal. No rals.

SUMMARY: Here indicate areas of infiltration, consolidation, etc., lobe by lobe:

Is claimant taking prevocational training? No.

How many hours a day?

Diagnosis:

Classification (National Tuberculosis Association Standards).

Condition.—Active, quiescent, apparently arrested or arrested. (Underscore the condition found.)

Stage.—Incipient, moderately advanced, or advanced. (Underscore the stage found.)

Name of examiner: M. J. Seid, Ass't Surg. (R).

Address: U. S. V. B., S. F., Cal.

(Testimony of Dr. Herbert C. Watts.)

The WITNESS.—Exhibit 8 consisting of three sheets, being the report of Dr. J. G. Hefflewhef and Dr. Joseph S. Hart, under date of September 18, 1924, is an examination report, and a part of the records of the United States Veterans' Administration. The third sheet is the report from the Roentgenologist; at that time the blanks did not provide for the x-ray reports on the regular 215, and it was placed on a separate sheet.

Mr. EVANS.—We offer Exhibit 8.

Mr. MAHAN.—Well, we make the same objection, and further [84] add the objection that it is the conclusion of these doctors. We make the further objection, if it please the Court, that it is not shown that any attempt was made here to bring these doctors into court.

The COURT.—I know, but these are public records. What is this last one here attached.

Mr. EVANS.—An x-ray report.

The COURT.—What did you call that?

A. Roentgenologist.

Mr. EVANS.—What is that?

(Testimony of Dr. Herbert C. Watts.)

A. A man skilled in the art of taking and developing x-ray pictures.

The COURT.—Oh, he is a photographer. Why didn't you call him that. Admitted.

Mr. MAHAN.—Exception.

Exception noted.

And thereupon over the objection was received in evidence the report identified as and marked Defendant's Exhibit 8, being as follows:

DEFENDANT'S EXHIBIT 8
REPORT OF PHYSICAL EXAMINATION

C. No. 435834

1. Claimant's name: McCleary, Harry Dewitt M.

2. Service, rank, and organization: Pvt. 168th Inf. Co. Hdqrs.

3. Present address: 237 Leavenworth St., San Francisco, Calif.

4. Age, 27.

5. Color: w.

6. Principal prewar civil occupation: Laborer.

7. Date of induction: 3/29/1917.

8. Date of discharge: 5/9/1919. [85]

9. Brief history of claimant's disability during service:

Was hospitalized in France in 1918 for "gas" and influenza. Regular discharge.

Medical and industrial—since discharge. (Use reverse side.)

10. Present complaint (subjective symptoms, not diagnosis).

Pains in chest (when he breathes). No cough—considerable production 1-6 oz. Appetite good. Bowels somewhat constipated. Not losing weight. Feels like he has fever at times. Occasional night sweats. Tires easily.

11. Physical examination: (Claimant must be stripped. For tuberculosis examination use other side. If an X-ray examination has been made, give the date, place, authorship, and interpretation of radiogram.)

Well developed, fairly well nourished man of 27 years. Skin clear—not moist.

Head: pupils equal, reg. & react to 1 & a. Ears: neg.

Mouth: Teeth good. Tongue furred. Ronsillar fossa shows some tonsillar tissue (tonsillectomy in 1919). Throat neg.

Neck: Small discrete (bilateral) adenopathy anteriorally.

Thyroid not palpable.

Chest, heart, apex beat 6 rib inside nipple line sounds reg. No murmurs. Pulse 78. BP 120/78 P. P. 52.

Abdomen: No tenderness or rigidity. No masses.

Genitals & Rectum neg.

Extremities: neg.

Reflexes: knee jerks not accentuated.

Vision (Snellen chart): Uncorrected, R-20/ L-20/. Corrected by glasses, R-20/ L/20.

Hearing (spoken voice): R- /20 L- /20.

12. Diagnosis: Ch Pul. Tbr arrested. [86]

13. Prognosis:

14. Is claimant able to resume his prewar occupation, in your opinion? Yes. If not, state why.....

15. Is claimant bedridden? No.

16. Is claimant able to travel?.....

17. Do you advise hospital care? No.

18. Will claimant accept hospital care? Yes.

19. Is an attendant necessary? No.

20. Is his physical and mental condition such that vocational training is feasible? Yes.

21. Did you examine the man yourself on this date? Yes.

22. Place: San Francisco, Calif. Date: 9/18/24.

Name: J. G. Hepplewhef, M. D. Title.....

Jos. S. Hart.

Medical and industrial history since discharge:

Any acute intercurrent illness? Yes. Broncho-Pneumonia in 1921, followed by empyema.

Names of all physicians who have treated claimant: Dr. Alexander at Twin Falls, Idaho, in 1921. When? 1921.

In what hospitals, when and where? None.

Employed continuously? No. When and where?

.....

Employed at present? Yes. Amount of wages per month, $135.00 per mo.

Name of employer: Pommin Corset Co., 951 Market St., San Francisco, Calif. Nature of employment: Window trimmer & show card writer.

Amount of time lost on account of sickness: 2 yrs.

Nature of disease: Chest trouble.

If not employed at present, why?.....

Any additional remarks: None. [87]

SPECIAL TUBERCULOSIS REPORT.

(In cases of suspected tuberculosis, the following information must be furnished, in addition to the report on the other side of the sheet.)

If the man has been treated since discharge from military or naval service, give the name and address of hospital or physician, with dates, and the disability for which he was treated. In recording the physical examination use form below, filling in all blanks carefully:

Temperature: 36.8 c. Pulse: 78. Time of examination: 10:30 A. M.

Height, with shoes: 73 inches. Weight (without coat): 170.

Did you weigh the man yourself? Yes. Normal, 170. Highest, 175 lbs. Lowest, 160 lbs.

Sputum (positive or negative): Not obtainable. If positive, how many specimens were examined?

.....

EXAMINATION OF CHEST.

Shape: Full. Mobility: Free & gnal.

Palpation: Fremitus: S1 increased on right side.

Percussion: R. lung D R in upper chest especially noticeable over clavicle & axillary base.

L. lung: Negative to percussion, except axillary (Post) base.

Ascultation: R. lung: Slight harshness to breath sounds at apex—no rales.

L. lung: Negative to rales. Breath sounds somewhat harsh at apex.

"X" ray Report attached: J. G. Hefflewhef.

Recommend 10%, on chest findings.

J. G. Hefflewhef, JGH.

Spec. N. P. Report attached: J. G. Hefflewhef.

[88]

SUMMARY: Here indicate areas of infiltration, consolidation, etc., lobe by lobe:

Is claimant taking prevocational training?.....

How many hours a day?.....

Diagnosis: Ch. Pul Tb.

Classification (National Tuberculosis Association Standards).

Condition.—Active, quiescent, apparently arrested or arrested. (Underscore the condition found.)

State.—Incipient, moderately advanced, or advanced. (Underscore the stage found.)

Name of examiner.....Address.....

UNITED STATES VETERANS' BUREAU

Department of Roentgenology.
San Francisco, California, 5/23/24
X-Ray Report of McCleary, Harry D.
C#435834 File No. 5925

Examination: Chest. Ref. by Dr. Seid.

Diagnosis and remarks: The excursion of the diaphragm is free. The apices are hazy but light up fairly well. The right hila is large. There is a large amount of peribronchial thickening extending into the lower right lobe. There is some dilatation of the bronchii in the upper right lobe. There is a moderate amount of peribronchial thickening on the left. There are a few dense glands in the hila, bilateral.

Conclusion: Chest is negative except as above mentioned.

Stacy B. Hall, M. D.,
Roentgenologist.

(Testimony of Dr. Herbert C. Watts.)

Q. Referring, Dr. Watts, to the testimony in the deposition of Dr. Alexander I will ask you whether the reports which the Veterans' Administration have in any way give a different diagnosis or con- [89] tradict, and in what manner they contradict, the conclusions of Dr. Alexander as to the existence of active tuberculosis in McCleary in 1920?

Mr. MAHAN.—I would like to find out if you have any particular examination at the same period

(Testimony of Dr. Herbert C. Watts.)

of time. I object to the comparison; he has the right to recite any facts or statements shown by these exhibits but they are * * *

The COURT.— * * * What are you asking?

Mr. EVANS.—I am asking whether there is a difference in opinion between Dr. Hal Bieler and Dr. Alexander, who testified this morning, at the same time and place, as to the diagnosis of active tuberculosis in 1920.

The COURT.—In reference to Dr. Bieler's report there?

Mr. EVANS.—Yes, your Honor.

The COURT.—Oh, I think they show for themselves. I don't think the Doctor, as a witness, is called upon to state that. You can point it out yourself. The objection will be sustained.

Q. How does the diagnosis made by Hal Bieler on June 19, 1920, the diagnosis being "bronchial asthma; pleurisy, chronic, fibrous, with effusion; possibly T. B.," differ with that diagnosis made of Harry McCleary by Dr. Alexander in 1920, at the same time?

Mr. MAHAN.—Objected to on the ground that the difference is shown.

The COURT.—Why, I think so. Why ask this witness. Sustained.

Q. You heard the testimony read in the deposition, Doctor, did [90] you not, this morning, Dr. Alexander's?

A. Yes, sir.

(Testimony of Dr. Herbert C. Watts.)

Q. And in that testimony it was stated that the diagnosis was that his pleurisy with effusion was probably due to tuberculosis. The testimony of Hal Bieler in Exhibit 1 shows that he was suffering from pleurisy, chronic, fibrous, with effusion, and bronchial asthma, possibly T. B. Will you explain to the Court and jury what the difference between bronchial asthma and pleurisy with effusion is, from the diagnosis made by Dr. Alexander?

Mr. MAHAN.—Objected to on the ground that it is an incorrect statement of fact contained in the deposition of Dr. Alexander. He didn't state in that deposition that it was probably tuberculosis.

The COURT.—Sustained. If you want the Doctor to explain bronchial asthma he may.

A. Bronchial asthma means a little spasm of the bronchi, which are the small tubes which lead to the air cells. It may be caused by a number of things, but that of itself would not be tubercular. Chronic pleurisy, with exudation, if you are asking about that, might or might not be tubercular.

Q. Having access to the testimony of both Hal Bieler and Dr. Alexander what is your opinion as to whether it was or was not tubercular?

Mr. TOOLE.—That calls for the opinion of one witness based on the opinion of others.

The COURT.—Sustained.

Mr. EVANS.—Exception.

Exception noted.

(Testimony of Dr. Herbert C. Watts.)

The WITNESS.—As to the disabling effects of active tuberculosis, in answering that you have to qualify it. A man might [91] have active tuberculosis and be able to carry on very well, and he might have active tuberculosis and be able to carry on a light occupation. He might have active tuberculosis and not be able to move out of his bed. Just active tuberculosis, by itself, wouldn't give you any index as to the disabling part.

Q. When, in your opinion, was the tuberculosis, in the case of McCleary, totally disabling, as shown * * *

Mr. MAHAN.— * * * Objected to as not based on any statement of fact in the record.

The COURT.—Sustained.

Mr. MAHAN.—This man is not qualified.

The COURT.—Sustained.

Q. It has been testified that Mr. McCleary was totally disabled and bedridden for several weeks in 1920, and that that disability or trouble was due to his lung condition at that time. In your opinion was that such a condition, as shown by the evidence, to be at that time permanently and totally disabling? That is, was it reasonably certain that the condition of the lungs from which he suffered in 1920 would continue throughout the balance of his lifetime, as shown by the testimony of Dr. Bieler and Dr. Alexander?

Mr. TOOLE.—That is objected to because it assumes a state of facts not properly before this Court.

(Testimony of Dr. Herbert C. Watts.)

The COURT.—Sustained.

Mr. EVANS.—Exception.

Exception noted.

There was no cross-examination, and the Witness excused.

Thereupon counsel for defendant announced the defendant rests. [92]

Mr. MAHAN.—No rebuttal testimony.

And thereupon the testimony was closed.

The COURT.—Well, you may renew your motion.

Mr. EVANS.—If it please the Court we do renew our motion.

The COURT.—I will hear it argued.

Thereupon the respective counsel presented to the Court their arguments upon defendant's motion for a directed verdict, heretofore made and set forth in the record and renewed at this time.

Thereafter, at the conclusion of said arguments the matter was submitted, and thereafter the Court ruled on said motion for directed verdict as follows:

By the COURT.—Call in the jury. At the conclusion of all of the evidence the Government makes

the usual motion for a directed verdict on the general ground that the evidence is in such a state that if the case went to the jury and the jury found for plaintiff, in law the verdict could not be sustained,—the Court would be under obligation to set it aside. And that raises the question whether upon the whole evidence there is sufficient and substantial evidence to sustain such a verdict, providing the jury would find in the plaintiff's favor. All reasonable inferences that the evidence will bear must by the Court, as a matter of law, be considered most favorably against the moving party, the United States, and to favor the plaintiff, and having done so, if it is the Court's judgment that the evidence would not sustain a verdict for plaintiff, if the jury find one, it is its plain duty to take the case away from the jury and decide the motion in favor of the Government. The reason for this is [93] of course that whether or not there is any substantial evidence which would sustain a verdict for the plaintiff becomes a question of law and it is not a question of fact for the determination of the jury, and only when the Court decides against the motion do questions of fact arise for a jury's determination. And another reason for the motion is that in an appealing case such as this is juries are human, even as the Court is, but they are more susceptible to be moved by sympathy and less inclined to look at the case strictly from the standpoint of reason, but are motivated to some extent by sympathy, in general cases, to favor one whose situation is un-

doubtedly as bad as is the plaintiff's here. It must not be forgotten, however, that the plaintiff is not deserted by his Government even now, when he is totally disabled,—under total disability and permanent disability,—because we take judicial notice, even if it is not in the record, that the Government is caring for him through what is called compensation.

So now we come to the question of this case. What is the evidence? It seems that the plaintiff, in the war, took out an insurance policy. The United States was the insurer. These policies are like any others issued by any insurance company. They are contracts. Those who take out the policies must perform the conditions on their part; that is to say, pay the premiums, and if the contingency on which the policy is predicated, happens, he having paid his premiums to that time, then he would get his money, some Ten Thousand Dollars. The premiums were made very moderate. The Government always is the most liberal of any nation on earth with the soldiers. It provides an increased pay while in service, provides him with compensation if he is injured, cares for his family while he is away, and this in- [94] surance was a contract especially given to him that if he became totally and permanently disabled,—for that was the only contingency on the happening of which the Government obligated itself to pay,—if he became totally and permanently disabled while the policy was in force,—that is to say, while the premiums were be-

ing paid,—then the Government would pay the money,—and not obligated to, otherwise. This contract, like any other, if the insured person fails to pay the premiums before the contingency happened, it didn't help him any if afterwards the contingency happened, because then the policy had expired. Just as if you take out a policy with an insurance company against accident, you pay your premium; you quit paying it and the next week an accident happens; you have no right to claim anything from the insurance company because of that accident, after your forfeiture by default in the payment of your premiums.

Now the plaintiff says in this case that he did not default; that when he had ceased to pay premiums, as he did, on the first of July, 1919, that already he was totally and permanently disabled; and if he was he is entitled to his money. The Government on the other hand says "No, he was not then totally and permanently disabled, though he is now." No matter how sad his condition now is, unless his proof is that he was totally and permanently disabled on July 1, 1919, and of course all the time since, hard as his condition may be, he is entitled to nothing on this policy. He is the one that has been at fault. And moreover, the difficulty of proof, reference to which has been made on behalf of the plaintiff, it must be remembered that no matter how difficult the proof is, anyone that comes into court and asserts a claim must prove it, and if he has not the ability to secure the evidence to prove it that

is his hard luck, and due in fact to his own failure to keep up his premiums until he asserted his claim and made his proof. [95]

The evidence will show in this case that the plaintiff never asserted to the Government that he was totally and permanently disabled and claimed the insurance until 1930, some eleven years after he had left the army and quit paying the premiums.

Now what is the evidence? He was gassed during the war, some kind of gas; sent to the hospital; he was in the hospital a large part if not all the time between the fall of 1918 until he was discharged in May, 1919, so he testifies, and it must be accepted, in the circumstances. He was discharged, and took a discharge which states that he was in good physical condition; no evidence that he made any claim then that he was suffering any disability of any kind. He comes home. The moment he leaves the army he fails and defaults in the payment of premiums on this policy. He had no idea himself of course,—that is, positive,—that he was then totally and permanently disabled because if he had been he would have walked up and demanded his money from the defendant and on proof made would have gotten it. Of course that does not debar his right of recovery if in fact he was then totally and permanently disabled. That summer he stayed at home, and a little later he presented a claim, not for this insurance, but for compensation, a gratuity which the Government gives to soldiers who have suffered any little disability in war, or

greater disability,—the fact is, I think, if he suffers any handicap,—to the extent of ten percent. He presented a claim for that compensation, according to the evidence, June 19, 1920,—June 19, 1920. He was then under the care of Dr. Alexander; that was more than a year after he had come home. And he then presented a claim for compensation, reciting what he had been doing, and making no claim whatever that he was totally disabled, much less permanently disabled; reciting some amount of work on the farm at Seventy-five Dollars a month, which he [96] does not remember now; something of carpenter work. It may be fair to say that it is improbable that he did any more work, if he did as much, as the average man on a small five-acre lot, perhaps just a garden piece, and he may not have done very much, if any. Under the treatment of Dr. Alexander he went to bed for some twelve days, if I remember right, maybe a little more,—May twenty-second to June eighteenth,—I think the Doctor testified some twenty-four or five days, three weeks,—and the Doctor now says that he diagnosed him clinically as tubercular; that he had some trouble of the pleural cavity requiring drawing off of some fluid, and some other symptoms the Doctor tells about. That he tested him for tuberculosis by testing the sputum, and found nothing in the sputum which indicated tuberculosis, though that is not conclusive,—a man may be actually tubercular and not disclose it in the sputum,—and regardless of that, clinically he had diagnosed him as tubercular. I don't know whether he placed that

in his record or whether it was a matter of his recollection,—it doesn't matter,—the Doctor now says, testifying, that at that time he diagnosed him as tubercular. After that the plaintiff, securing compensation, went to school at the Government's expense; at school he learned display card writing and the matter of display in dressing show windows, if I remember right, something of that sort, and he went for something like a year or maybe less, to a school, and was paid One Hundred Dollars a month, which of course would not debar him of his insurance if the conditions were met by him and he was entitled to it; and after that he went to work in Spokane for a time,—no, after he left school,—I think he was eight or nine months in training in Spokane, window display and card writing,—and after that he went to [97] California, to San Jose, and he says he worked about a year at card writing, off and on, a year,—and he got some thirty-five dollars a week for that. His wife says that he worked there about three years. He testifies as to his feeling sick, loss of energy, under weight, sweating, and that from the very beginning,—and over those three years, or whatever he remained there,—worked for Hale Brothers. His wife testified he worked ten months in San Jose, yes, at Thirty Dollars a week,—I think he said Thirty-five,—Thirty—Thirty-five,—then they went to San Francisco, and she testifies that he worked for the Pomin Corset Company, card display, same wages, for over three years; that he lost much time, and that he worked some time, which I don't remember just

what the amount of it was, for Hale Brothers, doing the same kind of work; some intimation he was not working all the time. Then for a while he went to work selling radios; and then afterwards he was examined by various doctors for the Government, who found no evidence of tuberculosis, until later on came a condition which disclosed that he was actively tubercular, I think in 1930 the Government classified him then as a total disability because of active tuberculosis—total disability and permanent; in other words, reasonably likely it will last forever. Now the question is whether this evidence, if it would go to the jury, would warrant the jury to find that when he ceased paying premiums on his insurance, July 1, 1919, whether he was then totally disabled and permanently disabled. Total disability means what it says,—substantially all,—disabled from being able to carry on any kind of labor by which he could earn a likelihood, and it is permanent when it is reasonably likely, in the circumstances, that it will last for a long time,—indefinitely, if not for [98] life. There can be nothing positive. Nothing can be certain. Nothing can be absolutely sure. So the law relies upon reasonable probability. The plaintiff is basing his claim upon the tuberculosis that existed in May and July, 1919, active tuberculosis. But the question then arises, suppose the proof is sufficient to hold that on July 1, 1919, which is almost a year before he sought the advice of any doctor as to his condition, suppose the evidence is sufficient to find that at that time he had active tuberculosis. Does that suffice to prove

that he was then totally disabled from earning a livelihood? Not twenty-five percent, not fifty percent, not seventy-five percent, but substantially all. And does the evidence disclose that at that time it was reasonably likely that condition would continue indefinitely, or did he have a prospect of a cure? The doctors tell us and we all know that active tuberculosis is curable, providing, as Dr. Hobson said, you take it early and follow the advice of your doctor. But he waited a year after he had quit paying premiums on his policy before he even went to a doctor, and then Dr. Alexander found it was active tuberculosis. Thereafter were his labors with the various companies mentioned, at substantial wages, and for three or four years, before he was finally down with what is now recognized as disabled,—active tuberculosis.

The courts have treated of this, and I can do no better than to read some of their language which sounds to me applicable to this case. In the case of Nicolay against the United States. Nicolay came home from the war in March, 1919. He went to his farm in Kansas and did a little farm work that summer. He was not strong,—that is the evidence; had a cough, raised mucous and blood, and the doctor then suspected the existence of tuber- [99] culosis and prescribed wholesome food; that was right after he came back from the army. His doctor testified he was not able to do steady, all-day work. In 1920 he took vocational training, and then attempted to look after chicken incubators, but the work was too heavy. In January, 1922, he

was x-rayed, and the findings were chronic, active tuberculosis of the left apex. Following that he went to New Mexico, where he was again examined with a finding of inactive tuberculosis. He returned from New Mexico to his home in Kansas and he did little or no work until 1925, that is, after 1923. In 1925 he worked for a contractor for about eight months but his condition was such that he was off from a third to one-half of the time, and still he did some work irregularly, running from two to seventeen hours a day, and he didn't work every day. And then it goes on to show that in sixteen months he worked some thirty-six hundred hours, which would be computed as usual four hundred and fifty days in sixteen months. That was late in 1926. Other short periods of employment after that, and at the time of trial he was recognized as tubercular, totally and permanently disabled.

Now the Court says, as I have said to you, and as we all recognize, it is not sufficient at the time of trial that he is tubercular and totally and permanently disabled, but the question is whether he was tubercular at the time in March,—that man had been gassed, too,—in 1918,—the question is whether in March when he stopped paying his premiums, whether he was then not tubercular alone, but tubercular to a degree that he was totally and permanently disabled. And here is what the Court says:

> "We are of the opinion that there was evidence from which a jury might properly have

> found that the [100] insured was totally disabled on May 2, 1919, when his premiums stopped; there was some evidence that he was then an active tubercular, and the record discloses what is coming to be a matter of common knowledge, that active tuberculars should have complete rest." "But," the Court says, "in addition to the disability being total, it must be permanent."

And then it goes on to give an illustration:

> "If the insured had suffered a broken leg," on that day, "or had contracted the scarlet fever on that day,"—when the policy expired because he quit paying premiums,—"he would have been totally disabled while his policy was in force; but unless he disregarded the advice of his doctors no one would say that such a disability was permanent."

The same regulations as to the definition. Then he goes on to say unless the plaintiff has produced some substantial proof that it was reasonably certain, on or before May 2, 1919, that his condition of total disability, by reason of the tuberculosis, was one that would continue throughout his life, the case was properly decided for the Government. "We cannot find any such evidence in the record. If, for the moment, we disregard the evidence as to the succeeding years,"—the work, and reports on his condition,—"we have at best an insured in the early stages of tuberculosis. It is a matter of common knowledge that many such incipient tubercu-

lars respond readily to the simple treatment of rest and nourishment; the activity is arrested, and while there probably always will be a susceptibility of recurrence, they are able to and do live out their lives following gainful occupations." Dr. Hobson said something [101] about that. "On the other hand there are some that do not respond to treatment and their condition is incurable from the start. The burden of proof is upon the plaintiff; if his evidence leaves it a mere matter of speculation as to the permanence of his total disability in May, 1919, he cannot recover." Then he cites from Judge Kenyon in a like case. The Court finally concludes that he had not sustained that burden of proof; that it was mere speculation whether at the time when he quit paying his premiums the tuberculosis, which it was there admitted rendered him totally and permanently disabled, was not curable. And that, the Court thinks, is a parallel case on practically all fours with the case before us here.

Let us concede, let it be granted, that he had tuberculosis when he left the army and when he quit paying premiums, on the first of July, 1919,—although there is no evidence by anyone that he actually had it until a year later, by Dr. Alexander,—there is no evidence that if he had been given the proper care, rest, treatment, at that time, that his case was not a curable one, and if that is so it is not a case of permanent disability, however total it might have been. Nicolay against the United States, 51 Federal, Second, 170.

Another case along the same line is that of United States against Harrison, in the 49th Federal, Second, 227, where Judge Parker refers to the fact also that while a man who has active tuberculosis may be considered at that time as totally disabled, yet that is no proof that he is permanently disabled, unless it so appears from the evidence. And he says, speaking of the man's work, a man continuing to work for a period of more than three years,—under circumstances generally irregular and intermittent, according to the testimony,—but even if we assume [102] that he had the disease at the time he quit paying the premiums, it does not follow that he was then totally and permanently disabled as a result thereof. Whether tuberculosis results in total and permanent disability depends on the facts of each particular case, and there is no sufficient evidence there.

Now in this case, as I see it, the hind sight is better than the fore sight. After all of these years the plaintiff is now totally and permanently disabled, but now that is no inference to warrant that at the time when he ceased paying these premiums he was totally and permanently disabled. The fault is his. If he had kept up his premiums until he asserted his claim, and made the proof, if he could make it, why he would have received his insurance,—but he comes in now, after thirteen or fourteen years that he hadn't paid the premiums, comes in at this late day and asserts that he was then permanently and totally disabled, and the burden is

his to prove it. He has failed, and the motion for a directed verdict on behalf of the Government is granted.

Mr. MAHAN.—May we have an exception?

The COURT.—Evidently, if you take it.

Exception noted.

Mr. MAHAN.—And may we have thirty days in addition to the usual time, to prepare a bill of exceptions?

The COURT.—You may.

Mr. MAHAN.—If your Honor please, may we have the exhibits left here for the reporter, so he can get out the bill?

The COURT.—If the other side agrees.

Mr. EVANS.—We agree, with this condition, that the exhibits may be copied and the originals returned to the records of the Veterans' Administration, if the Court so orders. [103]

The COURT.—Very well. Let that agreement be entered in the record.

The COURT.—The juryman on the end will step forward as foreman and sign the verdict. Remember that the Court is responsible for the verdict, and you sign it as a mere matter of form.

Whereupon the foreman of the jury signed the verdict in favor of the defendant, as directed. [104]

The foregoing is, within the additional time allowed by the Court, submitted by the plaintiff as a proposed bill of exceptions in his behalf.

SMITH, MAHAN & SMITH,
HOWARD TOOLE,
W. E. MOORE,
Attorneys for Plaintiff.

Due and legal service and receipt of a copy of the foregoing proposed bill of exceptions are hereby acknowledge this 20th day of December, 1932.

WELLINGTON D. RANKIN,
D. L. EGNEW,
SAM D. GOZA, JR.,
D. D. EVANS,
Attorneys for Defendant. [105]

STIPULATION.

It is hereby stipulated and agreed by and between counsel for the respective parties to the foregoing entitled action, that the foregoing proposed bill of exceptions on behalf of the plaintiff is a full, true, complete and correct bill of exceptions as to the proceedings had and the evidence adduced in said cause, and that the same contains all of the evidence adduced in said cause; and that the same may be approved and settled and allowed by the Court, as provided by law.

Dated, this the 20th day of December, 1932.

SMITH, MAHAN & SMITH,
HOWARD TOOLE,
W. E. MOORE,
Attorneys for Plaintiff.
D. L. EGNEW,
D. D. EVANS,
Attorneys for Defendant. [106]

[Title of Court and Cause.]

United States of America,
District of Montana.—ss.

I, George M. Bourquin, a Judge of the above entitled Court, before whom the above entitled action was tried, do hereby certify: That the foregoing is a full, true, complete and correct bill of exceptions in said cause; that the same contains all of the evidence introduced and given upon the trial of said cause; and that the foregoing is now, by me, hereby settled as corrected, allowed and approved as a true and correct bill of exceptions in said cause.

Done in open Court this 31st day of December, 1932.

BOURQUIN,
Judge.

[Endorsed]: Filed Dec. 31, 1932. C. R. Garlow, Clerk. [107]

Thereafter, on Feb. 6, 1933, notice of appeal was duly filed herein, in the words and figures following, to wit: [108]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To: United States of America, Defendant, and to Wellington D. Rankin, United States District Attorney, District of Montana; D. L. Egnew, Assistant United States District Attorney, District of Montana, and D. D. Evans, Chief Attorney, United States Veterans' Administration, Fort Harrison, Montana, Attorneys for Defendant:

You, and each of you, will please take notice that the plaintiff above named does hereby appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the order, judgment, and decree entered and filed in the above entitled cause on the 3rd day of December, 1932, and that a certified transcript of the record will be filed in the said Circuit Court of Appeals within thirty (30) days from the filing of this notice.

SMITH, MAHAN & SMITH,
HOWARD TOOLE,
W. E. MOORE,
Attorneys for Plaintiff.

Service of the above and foregoing notice of appeal, and the receipt of a copy of the same is hereby acknowledged this 6th day of Feb. 1933.

WELLINGTON D. RANKIN,
U. S. District Attorney, District of Montana,
SAM D. GOZA, JR.,
Assistant U. S. District Attorney, District of Montana,
D. D. EVANS,
Chief Attorney, Veterans' Administration, Fort Harrison, Montana,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 6, 1933. C. R. Garlow, Clerk. [109]

Thereafter, on Feb. 6, 1933, petition for appeal was duly filed herein, in the words and figures following, to wit: [110]

PETITION FOR APPEAL.

[Title of Court and Cause.]

The plaintiff above named, feeling himself aggrieved by the order, judgment and decree made and entered in this cause on the 3rd day of December, 1932, does hereby appeal from said order, judgment and decree, and from each and every part thereof, to the Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the as-

signment of errors herein. The plaintiff prays that his appeal be allowed and that citations be issued as provided by law, and that a transcript of the record, proceedings and papers, upon which said order, judgment and decree were based, duly authenticated, be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, as by the rules of said Court in such cases made and provided.

SMITH, MAHAN & SMITH,
HOWARD TOOLE,
W. E. MOORE,
Attorneys for Plaintiff. [111]

Service of the above and foregoing petition for appeal, and the receipt of a copy of the same is hereby acknowledged this 6th day of February, 1933.

WELLINGTON D. RANKIN,
U. S. District Attorney, District of Montana,
SAM D. GOZA, JR.,
Assistant U. S. District Attorney, District of Montana,
D. D. EVANS,
Chief Attorney, U. S. Veterans' Administration, Fort Harrison, Montana,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 6, 1933. C. R. Garlow, Clerk. [112]

Thereafter, on Feb. 6, 1933, assignment of errors was duly filed herein, in the words and figures following, to wit: [113]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now Harry D. McCleary, plaintiff in the above entitled action, by and through his attorneys, Smith, Mahan and Smith, Howard Toole and W. E. Moore, and in connection with his petition for appeal herein and the allowance of the same, assigns the following errors which he avers occurred in the trial of said cause and which were duly excepted to by him at the time of trial herein, and upon which he relies to reverse the judgment herein:

I.

That the District Court erred in granting defendant's motion for a directed verdict, made at the close of all the testimony, the granting of which motion was duly excepted to at the time.

II.

That the District Court erred in directing the verdict for the defendant, to which error the plaintiff took due and timely exception.

III.

That the District Court erred in receiving and filing the directed verdict for the defendant, to

which error the plaintiff took due and timely exception.

IV.

That the District Court erred in entering judgment upon [114] the directed verdict for the defendant, to which error the plaintiff took due and timely exception.

V.

That the District Court erred in admitting certain documentary evidence, to which error the plaintiff took due and timely exception.

VI.

That the District Court erred in refusing to admit certain opinion evidence, to which error the plaintiff took due and timely exception.

SMITH, MAHAN & SMITH,
HOWARD TOOLE,
W. E. MOORE,
Attorneys for Plaintiff. [115]

Service of the above and foregoing assignments of error and the receipt of a copy of the same is hereby acknowledged this 6th day of Feb., 1933.

WELLINGTON D. RANKIN,
U. S. District Attorney,
SAM D. GOZA, JR.,
Assistant U. S. District Attorney,
D. D. EVANS,
Chief Attorney, Veterans' Administration, Fort Harrison,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 6, 1933. C. R. Garlow, Clerk. [116]

Thereafter, on Feb. 6, 1933, order allowing appeal was duly entered herein, in the words and figures following, to wit: [117]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon application of the plaintiff herein,

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment heretofore entered herein and filed on the 3rd day of December, 1932, be and the same is hereby allowed;

IT IS FURTHER ORDERED that the amount of the bond be fixed in the sum of Two Hundred Dollars as security for defendant's costs on appeal, and it is so ordered; and

IT IS FURTHER ORDERED that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings, be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

Done this 6 day of Feb., 1933.

BOURQUIN,
United States District Judge. [118]

Service of the above and foregoing order allowing appeal and the receipt of a copy of same is hereby acknowledged this 6th day of Feb., 1933.

WELLINGTON D. RANKIN,
U. S. District Attorney, District of Montana,
SAM D. GOZA, JR.,
Assistant U. S. District Attorney, District of Montana,
D. D. EVANS,
Chief Attorney, U. S. Veterans' Administration, Fort Harrison, Montana,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 6, 1933. C. R. Garlow, Clerk. [119]

Thereafter, on Feb. 6, 1933, citation was duly issued herein, which original citation is hereto annexed and is in the words and figures following, to wit: [120]

[Title of Court and Cause.]

CITATION ON APPEAL.

The President of the United States to:

The United States of America, Defendant; Wellington D. Rankin, United States District Attorney, District of Montana; D. L. Egnew, Assistant United States District Attorney, District of Montana, and D. D. Evans, Chief Attorney, United States Veterans' Administration, Fort Harrison, Montana, Attorneys for the Defendant:

You, and each of you, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at the City of San Francisco, California, in the Ninth Judicial Circuit, within thirty (30) days from the date of this writ, pursuant to an order allowing appeal filed in the office of the Clerk of the above entitled Court, appealing from the final order, judgment on directed verdict, and decree entered herein and filed on the 3rd day of December, 1932, wherein Harry D. McCleary is plaintiff and the United States of America is defendant; then and there to show cause, if any there be, why the order, judgment and decree rendered against the said appellant, as in the order allowing appeal mentioned, should not be corrected, and why justice should not be done to the parties in that behalf. [121]

This 6 day of Feb, 1933.

BOURQUIN,
United States District Judge.

Attest:

.....
Clerk.

.....
Deputy Clerk. [122]

Service of the above and foregoing citation on appeal is hereby acknowledged, with the receipt of a copy of the same, this 6th day of February, 1933.

WELLINGTON D. RANKIN,
U. S. District Attorney, District of Montana,
SAM D. GOZA, JR.,
Assistant U. S. District Attorney, District of Montana,
D. D. EVANS,
Chief Attorney, Veterans' Administration, Fort Harrison, Montana,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 6, 1933. C. R. Garlow, Clerk. [123]

Thereafter, on Feb. 6, 1933, praecipe for transcript was duly filed herein, in the words and figures following, to wit: [124]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above Entitled Court:

You will please certify to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, the following papers:

1. Complaint.
2. Answer.
3. Verdict.
4. Judgment.
5. Notice of appeal.
6. Petition for appeal.
7. Citation on appeal.
8. Order allowing appeal.
9. Assignments of error. [125]
10. Bill of exceptions.
11. This praecipe.

SMITH, MAHAN & SMITH,
HOWARD TOOLE,
W. E. MOORE,
Attorneys for Plaintiff.

Service of the above and foregoing praecipe and the receipt of a copy of the same is hereby acknowledged this 6th day of Feb., 1933.

WELLINGTON D. RANKIN,
U. S. District Attorney, District of Montana,
SAM D. GOZA, JR.,
Assistant U. S. District Attorney, District of Montana,
D. D. EVANS,
Chief Attorney, U. S. Veterans' Administration, Fort Harrison, Montana,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 6, 1933. C. R. Garlow, Clerk. [126]

[Title of Court and Cause.]

CERTIFICATE OF CLERK.

I, C. R. Garlow, Clerk of the District Court of the United States for the District of Montana, do hereby certify the foregoing transcript of pages numbered from 1 to 126 inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit as requested by the praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $24.40 and that the same has been paid by the appellant.

Witness my hand and the seal of said Court this 1st day of March, 1933.

[Seal] C. R. GARLOW,
Clerk.

[Endorsed]: No. 7102. United States Circuit Court of Appeals for the Ninth Circuit. Harry D. McCleary, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed March 4, 1933.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth District.

No. 7102

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY D. McCLEARY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION

HON. GEORGE M. BOURQUIN, JUDGE

Brief of Appellant

SMITH, MAHAN & SMITH
Helena, Montana
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THURBER'S, HELENA

INDEX

CASES CITED

CASES CITED—*(Continued)*

No. 7102

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY D. McCLEARY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION

HON. GEORGE M. BOURQUIN, JUDGE

Brief of Appellant

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STATEMENT OF THE CASE

In this action, brought upon a policy of War Risk insurance, the appellant, Harry D. McCleary, hereinafter referred to as the plaintiff, prosecutes his appeal to this court from a directed verdict for the appellee, United States of America, hereinafter referrd to as the defendant.

The plaintiff commenced his action on April 26, 1932, for recovery of the total and permanent disability benefits under his policy of War Risk insurance, issued in the sum of $10,000.00 while serving in the United States army. It is alleged in paragraph IV of his complaint that he was totally and permanently disabled at the time of his discharge, to-wit, the 9th day of May, 1919, by reason of having been gassed and afflicted with influenza, with a resultant pulmonary tuberculosis. (R. 4). By its answer, the defendant admits the issuance of the policy of War Risk insurance in the sum of $10,000.00, on November 16, 1917, and that the premiums were paid thereon, to and including the month of May, 1919, and alleges that said insurance lapsed for non-payment of premiums on the 1st day of July, 1919, but denies the allegation of total and permanent disability. (R. 8). The simple issue framed by these pleadings is whether or not the plaintiff was in fact totally and perman-

ently disabled at or prior to midnight of June 30, 1919, the expiration of the grace period under the policy herein sued upon.

Upon the trial of this case the plaintiff adduced substantial evidence, as disclosed by the record, indicating that he was totally and permanently disabled on or before the date of his discharge from the service, and in consonance with such evidence, the court denied *pro forma* defendant's motion for a directed verdict, made at the conclusion of the plaintiff's case, on the ground that the evidence was insufficient to make a prima facie case for the plaintiff and to show total and permanent disability (R. 56), whereupon the defendant adduced its evidence, altogether documentary, consisting of alleged records of plaintiff's condition, physically, kept by the Veterans' Administration, with the exception of possibly expert testimony; it is undenied in the record that the plaintiff has been totally and permanently disabled from active pulmonary tuberculosis since March, 1932, which makes the issue herein as to whether or not plaintiff has been totally and permanently disabled from June 30, 1919, to March, 1932. Notwithstanding this fact, the court granted the defendant's motion for a directed verdict, made upon the same grounds as before, to-wit, that the evidence was insufficient to show total and permanent disability while the policy was in force

(R. 14), and it is from this directed verdict that plaintiff appeals to this court.

The assignments of error, raising the questions that the court erred in admitting certain documentary evidence and in directing the verdict for the defendant, are as follows:

ASSIGNMENTS OF ERROR

I.

That the District Court erred in granting defendant's motion for a directed verdict, made at the close of all the testimony, the granting of which motion was duly excepted to at the time.

II.

That the District Court erred in directing the verdict for the defendant, to which error the plaintiff took due and timely exception.

III.

That the District Court erred in receiving and filing the directed verdict for the defendant, to which error the plaintiff took due and timely exception.

IV.

That the District Court erred in entering judgment upon the directed verdict for the defendant, to which error the plaintiff took due and timely exception.

V.

That the District Court erred in admitting certain documentary evidence, to which error the plaintiff took due and timely exception.

VI.

That the District Court erred in refusing to admit certain opinion evidence, to which error the plaintiff took due and timely exception.

ARGUMENT

A. Plaintiff's evidence and all reasonable inferences therefrom must be considered most favorable to him.

The right to a trial by a jury was made a part of our Constitution by the Bill of Rights, incorporated into the Constitution as amended, even before the adoption of the Constitution by the original 13 states.

This amendment provides in part as follows:

> "In suits at common law * * * the right of trial by jury shall be preserved * * * "

In interpreting this amendment, the courts have uniformly held that if there is any substantial evidence then the case must be submitted to the jury; and this court has said:

> "The right to a trial by jury is guaranteed by the Constitution and it is not to be denied except in a clear case. The * * * decisions * * * have definitely and distinctly established the rule that if there is any substantial evidence bearing upon the issue to which the jury might properly give credence, the court is not authorized to instruct the jury to find a verdict in opposition thereto." *Smith-Booth-Usher Co. v. Detroit Copper Mining Co.*, 220 *Fed.* 600.

And Judge Gilbert, speaking for this court, has said

> "And on a motion for a directed verdict the court may not weigh the evidence, and if there is substantial evidence both for the plaintiff and the defendant it is for the jury to determine what facts are established, even if their verdict is against the decided preponderance of the evidence." (Cases cited). *U. S. Fidelity and Guaranty Co. v. Blake*, 285 *Fed.* 449.

And on motion for a directed verdict the evidence and all reasonable inferences therefrom shall be construed most strongly against the party making the motion. See *U. S. v. Meserve*, 44 *Fed.* (2*d*), 549.

> "The appellee is entitled not only to the most favorable aspect of the evidence which it will reasonably bear but is also entitled to the benefit of such reasonable inferences as arise out of the facts proved." *U. S. v. Meserve.*

Or, again,

> "But upon a motion for a directed verdict the court was bound to accept the testimony most favorable to the plaintiff." *Port Angeles Western R. Co. v. Tomas*, 36 *Fed.* (2*d*) 210.

For a recent study of this question as it relates to War Risk insurance actions, see U. S. v. Burke, 50 Fed. (2d) 653, and also Sorvik v. U. S., 52 Fed. (2d) 406.

In view of the settled law it becomes necessary to briefly summarize the evidence to ascertain whether or not there was any substantial evidence to support a verdict in this case, had one been returned for the plaintiff, and unless this court can say from the record that there is no evidence, or no reasonable inference from the evidence, that the plaintiff was totally and permanently disabled, then this case must be reversed and remanded for a new trial. See U. S. Fidelity & Guaranty Co. v. Blake, 285 Fed. 449.

B. There was substantial evidence of total and permanent disability to require submission of the case to jury.

Plaintiff testified in his own behalf: I was gassed in the Argonne October 26, 1918, by inhalation. I had influenza, after having been taken to the hospital and was hospitalized five months. Was underweight,

had night sweats and run a temperature all the time. (R. 14).

From the date of my discharge (May 9, 1919), I was home at Twin Falls, Idaho, about a year, sick all the time and not able to do anything. I felt weak and did not have any energy; my joints bothered me; I had a cough and chest pains; spit up a lot of sputum all the time and was treated during this period by Dr. Duncan Alexander, Twin Falls, Idaho, for about three months. After getting out of bed I didn't do anything. The first I did, or attempted to do after the war was vocational training, beginning December, 1920. Took bookkeeping and accounting 8 or 9 months. During that time I coughed a lot, was weak, underweight, and didn't have energy to do anything. Did not attend school regularly. Was sick and feverish and felt that way. Didn't get along in training. Left training at that time because the government discontinued it on account of my physical condition. After leaving training went home and stayed four months and did nothing, because I was sick. I coughed, had night sweats, ran a temperature. I was that way all of that period. (R. 15-16).

Next I went to Spokane, Washington; took display work in vocational training. Was there 8 or 9 months, during which time I had night sweats, coughed a lot,

did not work regularly on account of physical condition. Left Spokane and went to California to benefit my health. Worked at San Jose, California, show card writing off and on about a year. Did not work regularly. During all this time I had night sweats, coughed, temperature, underweight. Quit job after 8 or 9 months on account of physical condition. Went to San Francisco; did not attempt to work for several months, then attempted to work for Pomin Corset Co. writing cards and doing a little display work. The work was very light. Pomin knew my condition. I took my time in doing work and that is the way I got by with my job. If I had been a healthy person could have done the work in about one-third of the time. While working was underweight, coughed, spit up bad suptum. Quit that job and rested for several months, because I was sick and had the same symptoms I have already related. Mr. Pomin, my boss, was to come here as a witness but he died two years ago. (R. 16-17).

Next worked at Hale Bros., San Francisco. Show card work. Did not work steadily. Worked off and on because I was sick, had coughs, night sweats, temperature all the time. Left Hale Bros. and was sick at home. Several months later Hale Bros. gave me a lighter job selling radios in the radio department. Followed that for about three months. Couldn't stay with

it longer, had to quit on account of physical condition. Haven't done any work since then. (R. 17-18).

I was first advised in 1920 that I had tuberculosis, and was instructed as to how to take care of myself. I was able to get along because I had help from my father-in-law, W. E. Moore, my own family, and the government. (R. 18).

Since leaving Hale Bros. employ have been in the hospital most of the time. The government has rated me as permanently and totally disabled for pulmonary tuberculosis. There is a way to tell when you have that disease; I didn't have any trouble knowing I had it at all. I have it; cough a lot, spit up bad sputum and blood, sometimes, and have night sweats all the time and run a temperature. (R. 18-19).

Since my discharge (May 9, 1919), I have not been free from temperatures and pain condition in the chest. Dr. Alexander tapped by left lung in 1920 and took out fluid. (R. 19).

I was examined in a way when I was discharged from the army. Was run through a line with one doctor here and there. They tapped me on the chest, on the knees, and that was the end of it. The examination consumed maybe two minutes. (R. 25).

I was not returned to duty from the time I was in

the hospital for gas and influenza before I was discharged .(R. 26). I was rated totally disabled by the government in 1920, but not permanently so. (R. 26). After 1920 the next time I was under observation by government doctors was in 1930. (R. 27).

The witness, in testifying regarding the alleged documentary reports of a physical examination, from which witness was cross examined, said: None of those tests were made of me in any of these examinations. Examinations made of me while I was in training consisted of questioning and maybe sounding with a stethoscope. (R. 27).

Plaintiff's testimony was corroborated in the following particulars by Josephine McCleary, his wife: We were married July 12, 1923. At the time I was married I knew that my husband had been gassed. I knew that he had been taking training. I noticed that he coughed almost constantly. After we were married I noticed his health was not good. The second week after we were married, he went to work; I noticed he coughed most constantly, especially at night. Didn't seem natural or normal. He would get feverish and irritable. I am living with him now. He has the constant cough, which brings up a lot of sputum sometimes. I noticed the same symptoms right after we were married. I noticed that he coughed so much at

nights. He didn't get his breath and often was not able to go to work. I also observed night sweats right away after we were married. He seemed to be driving himself in everything that he did. He has not been well or normal since we have been married. (R. 28, 29, 30).

Dr. Duncan L. Alexander, Twin Falls, Idaho, testified: I have had plaintiff under my professional care. My first record of examination was May 16, 1920. Following that he was under my care to July 19, 1920. When first examining plaintiff, I found him suffering from cough, purulent expectoration, temperature. He was bedridden from May 22 to June 12. Examined several specimens of sputum myself and had two specimens examined at Dr. Hal Bieler's laboratory, the sputum in all cases being negative for tubercular organisms, but continued staphylococci and streptococci. May 25, 1920, a Widal aglutination blood test was done by the same laboratory for typhoid fever. Found negative. June 2nd, punctured the plural cavity and withdrew a large amount of clear yellow fluid. Symptoms were fever, continued coughing, with expectoration purulent, pain in the chest, difficulty with respiration. There was a dullness in one of the lungs. Made clinical diagnosis with~~out~~ the bacteriological findings of tubercular infection. Condition was very active. (R. 33, 34, 35).

In making the diagnosis I took into consideration the history of the case. (Rr. 38). Sometimes the history is of the utmost importance. In fact, more important than the clinical findings. Negative sputum for tuberculosis bacilli does not mean that a patient does not have tuberculosis. In my judgment, the symptoms which I related are ordinarily found in active tuberculosis cases. (R. 39). I found rales in this man; they were over the apices, in fact general over the chest. (R. 40).

The witness, Mrs. E. N. McCleary, mother of plaintiff, testified: I was where he was at the time he enlisted in the army. I saw him when he returned home in May, 1919. I certainly noticed a difference in his appearance than when I last saw him before he went away. He went away a perfect specimen of young manhood, and came back a perfect wreck; he was sick, poor and emaciated, coughing, and could hardly walk. He didn't have any pep and he had pains in his chest and was very sick in the spring of 1920. I took care of him when Dr. Alexander was treating him. He was bedfast two months. Dr. Alexander told me his sickness had been caused from gas. His appearance has improved now over what it was when he first got out of the army. (R. 40, 41, 42).

Dr. G. D. Waller testified: I am a practicing phy-

sician and surgeon, employed by the U. S. Veterans Administration. I made a physical examination of plaintiff in March, 1932, in conjunction with a board of three. The report of the examination made by me is dated March 18, 1932. Plaintiff was suffering from far advanced active tuberculosis and chronic pleurisy of both lungs. The disability is permanent and total. (R. 43). It is not necessary that a sputum test be positive for tubercular bacilli to establish active pulmonary tuberculosis. The diagnosis (referring to Dr. Alexander's diagnosis on clinical findings and history) would be doubtful, to a certain extent, but pleurisy with effusion, the vast majority of cases are tubercular. (R. 44-45). It is possible, with active pulmonary tuberculosis for a man to work; from a medical standpoint it is not advisable, for it would be detrimental to the patient's health; this would be true because exhaustion and worry are two of the worst things that can happen to a tuberculosis patient. (R. 45).

Dr. James D. Hobson testified: I am a physician and surgeon and a designated examiner of the Veterans Administration and have represented the Veterans Bureau since 1919. I examined the plaintiff first some months ago. He had fibrosis tuberculosis active. His sputum contains more tubercular bacilli than any case I have ever seen. They just come forth in showers.

He is totally disabled. It is reasonably certain that he will continue totally disabled the remainder of his life. Many times I have made a diagnosis of active tuberculosis on clinical findings and history alone. I have heard the findings upon which Dr. Alexander based his diagnosis; I would say that in all probability he (plaintiff) had a tubercular pleurisy with effusion, in 1920. (R. 47, 48, 49).

Taking into consideration the condition I found when I first examined him, I think the plaintiff has probably been continuously active since 1920. The symptoms of active tuberculosis are loss of weight, temperature, rise in pulse rate, weakness, general lack of ambition, impaired resonance with rales, and positive sputum. If McCleary had all those symptoms, with the exception of positive sputum, during any period of time, considering his history of influenza, and his history of pleurisy with effusion, I consider that he has been active since that time for the reason that a great many cases of tuberculosis show a severe influenza with pro-bronchial involvement. It is entirely possible for one with tuberculosis to work or follow an occupation, even with active tuberculosis. It would, however, very much endanger his life to do so. (R. 50). The less work a man does, the more likely he is to be cured, because I consider tuberculosis as a fire that is burning; he has to use all of his resources to

put it out. If he is worried, or has to work hard, of course a lot of his energy is going some place where it is misdirected. (R. 53).

In contradiction of plaintiff's evidence, and to disprove that he became totally and permanently disabled before June 30, 1919, defendant called one witness, and introduced into evidence, over plaintiff's objection, defendant's Exhibit 1. (R. 59). In this document, which purports to be the report of a physical examination in plaintiff's file with the Veterans Administration, under date of June 19, 1920, it is stated that plaintiff "has a vocational handicap which is major." (R. 64).

Also admitted, over objection, defendant's Exhibits 7 (R. 87) and 8. (R. 92). Number 7 is an alleged report of a physical examination made by an alleged doctor, one M. J. Seid, under date of May 23, 1924. It will be noted that the plaintiff testified that all examinations made of him between 1920 and 1930 by government examiners were superficial and that none of them covered any period of observation. (R. 27). The alleged reports of examinations admitted as exhibits do not reveal anything to the contrary.

Defendant's Exhibit 8 is an alleged examination report of Drs. J. G. Hepplewhef and Jos. S. Hart, dated September 18, 1924. There was nothing in this alleged

examination to indicate that it was more than a superficial one, or to disprove plaintiff's testimony regardiny it.

Defendant's Exhibit 2 was an application by plaintiff for compensation, on government form 526, and was received in evidence without objection. It was dated June 18, 1920, and in his application plaintiff claimed trouble with lungs, and the cause of disability, gas, influenza and exposure. (R. 65-66).

Defendant's Exhibit 3 was received in evidence without objection and was plaintiff's certificate of discharge. It had plaintiff's physical condition, when discharged, marked as "good." (R. 71-72). Plaintiff testified regarding this that the examination given him at date of discharge was superficial and consumed about two minutes; that he had not been returned to duty after being discharged from the hospital in the army, and went home sick. (R. 25-26). This is corroborated by the testimony of his mother, Mrs. E. M. McCleary. (R. 41).

Defendant's Exhibit 5 was received in evidence without objection and is an alleged report of a physical examination by an alleged C. H. Sprague of Pocatello, Idaho, dated December 10, 1921. This instrument reveals a diagnosis of tuberculosis chronic, pulmonary, which had been crossed out. (R. 76, 81,

83). The cancellation of the diagnosis is explained in part on the exhibit by a letter directed to Dr. Sprague, and signed by Paul I. Carter, Surgeon, USPHS, in which letter it is stated "The evidence, as submitted, is insufficient for this diagnosis, and you are requested to make the necessary correction and expedite the return of the examination to this office." (R. 84). The first endorsement on said exhibit and signed by Dr. Sprague reveals that he obeyed the command of his superior and changed his diagnosis, with this statement: "You will note corrections made as per your request." (R. 85). It is clear that Dr. Sprague, having supposedly examined this man, knew more about his condition and could better classify his disability than his superior, whom, the record reveals, never had examined the plaintiff. This should throw some light upon the value to be given to these alleged examination reports as evidence.

Defendant's Exhibit 6 was received in evidence without objection, and merely states that on September 3, 1924, plaintiff was suffering with pleurisy and rheumatism. (R. 85).

Defendant's only witness identified these exhibits. These documents are from the file of plaintiff kept by the Veterans Administration. Other than giving some alleged expert testimony with reference to the disabling

results of tuberculosis, the defendant had no further evidence.

The learned trial judge clearly reveals the theory upon which the directed verdict for the defendant was given in this language:

> "The burden of proof is upon the plaintiff; if his evidence leaves it a mere matter of speculation as to the permanency of his total disability in May, 1919, he cannot recover."

In using this language, the learned trial court was quoting from a decision in the case of Nicolay v. U. S., 51 Fed. (2) 170. (R. 112).

The trial court, in directing the verdict for the defendant, further used this language:

> "Let us concede, let it be granted, that he had tuberculosis when he left the army and when he quit paying premiums, on the first of July, 1919, —although there is no evidence by anyone that he actually had it until a year later, by Dr. Alexander,—there is no evidence that if he had been given the proper care, rest, treatment, at that time, that his case was not a curable one, and if that is so it is not a case of permanent disability, however total it might have been." (R. 112).

It is clear from the above language that the learned court was of the opinion that because tuberculosis is

classified as a curable disease, and that there was no positive testimony in the record for plaintiff that his disease of tuberculosis had reached a state, in 1919, so that it could be, at that time, classified as incurable; plaintiff is now unable to recover. We submit that such a rule would preclude the recovery on any policy where the insured was suffering from tuberculosis, unless the insured died before the policy lapsed for non-payment of premiums, or that he had suffered from active tuberculosis for a period of years before the lapsation of said policy, which would be impossible for a veteran of the World War to show, for the reason that if he had been suffering from tuberculosis he could not have been accepted into the army.

We further submit that such a rule is contrary to the recognized rules of this court. Even the learned trial court, in taking this view, disregarded his own opinion in the early case of McGovern v. U. S., 294 Fed. 108, wherein he stated:

> "As permanency of any condition (here, total disability) involves the element of time, the event of its continuance during the passage of time is competent and cogent evidence." *McGovern v. U. S.*

We submit that the foregoing quotation is a correct statement of the law. The court's ruling here denies

the liberal construction of the War Risk Insurance Act to which the insured has been held by all the courts to be entitled.

This court said, in Sorvik v. U. S., 52 Fed. (2) 406:

> "And in measuring the quantum of evidence necessary to sustain a possible verdict for the plaintiff, we must bear in mind the remedial purposes of the World War Veterans Act (38 U. S. C. A., par. 421, et seq.), which the courts have repeatedly held should be liberally construed in favor of the veteran."

In McNally v. U. S., 52 Fed. (2d) 440, the Eighth Circuit Court of Appeals construed a like problem, involving the permanency of a total disability, and said:

> "It is not necessary to show that prior to September 30th, 1919, a reasonable certainty existed that the disability was permanent. It must appear at some time prior to the determination of the case that the disability by September 30th, 1919, was already so far progressed as to be permanent."

See, also, U. S. v. Sligh, 31 Fed. (2d) 735.

It is, of course, impossible, we submit, for any physician to prognosticate the permanency of a disease in a patient without some constant contact with that patient, and observation over a period of time, and

to hold that an insured must prove absolutely the permanency of his disease at the date of its inception, without considering its progress thereafter, would be to deny the right of recovery in any case involving a germ disease; a person's resistive power to germ ailments will determine, in a large measure, the course of progress of such germ ailment, and that resistive power is not determinable without observation.

In reversing the trial judge, who had directed a verdict for the defendant in a War Risk case involving tuberculosis, in the case of Carter v. U. S., 49 Fed. (2d) 221, the court said:

> "And we think that under the evidence here the permanency, as well as the totality, of the disability was a question for the jury. A disability is permanent 'whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it, and where there is substantial evidence of such condition it is for the jury to say whether or not the disability in fact exists. Of course not every case of tuberculosis constitutes a permanent disability, but, *where a case has been attended with as many distressing symptoms, a reasonable man might well conclude that it would continue throughout the life of the insured.*
>
> " 'In view of the arguments made before us in this and other cases, as to the weight to be

> given the testimony of physicians, we think it well to observe that whether a disability caused by disease be of a permanent character or not is to be determined not exclusively from the diagnosis made or the opinions given by physicans *at the time of the onset but by the history of the disease and all other evidence in the case. A disease causing total disability may be thought at first to be temporary in character, but if its subsequent history shows that it is reasonably certain to continue throughout the life of the insured it is to be deemed permanent within the meaning of the policy* * * * If the evidence taken as a whole is of such a character, when viewed in the light most favorable to the plaintiff, as reasonably to lead to the conclusion that he was totally and permanently disabled, the issue is for the jury, to be decided by them in the light of all the evidence, including the testimony of physicians.' " *Carter v. U. S.* (Italics ours).

In reversing the trial court which had directed a verdict for the defendant, the First Circuit Court of Appeals said, in the case of Kelly v. U. S., 49 Fed (2d) 897:

> "If the jury believed this evidence they could reasonably conclude that none would employ him continuously and that he could not successfully do any work for himself, and that *in view of the later history of his case this condition was permanent.*" *Kelly v. U. S.* (Italics ours).

The Circuit Court of Appeals for the Second Circuit, in the case of Glazow v. U. S., 50 Fed. (2d) 178, in reversing the trial court's judgment for the defendant, in a case involving tuberculosis, where the evidence showed pulmonary tuberculosis some time in 1919, and where it was testified by a specialist, who examined the plaintiff in 1923, that at the time he believed the plaintiff could not recover, the court said:

> "In this state of the proof the verdict should have been directed for the appellant, for he was totally and permanently disabled * * * when discharged." *Glazow v. U. S.*

We submit, therefore, that the history of the case, that is, its progress and development, subsequent to 1919 (and it is undisputed here that the plaintiff is now suffering from far advanced tuberculosis which is disabling him in a permanent and total degree), should be taken into consideration with the other evidence by the jury in determining whether said disability was permanent and total in character in 1919.

In support of its direction of the verdict for the defendant, the trial court quoted extensively from the case of Nicolay v. U. S., 51 Fed. (2d) 170. We submit that this was error, and that the Nicolay case is not parallel, for the following reasons: Evidence in the

Nicolay case showed symptoms of tuberculosis immediately on plaintiff's discharge from the service, but three years thereafter (1922) X-ray plates indicated chronic active tuberculosis of the left apex; but in 1923, the same doctor found tuberculosis to be inactive, from X-ray plates, and the plaintiff in that case was employed practically continuously from August, 1924, until the early summer of 1927. Compared with the history in the Nicolay case we have here a severe gassing in 1918, 4 or 5 months hospitalization from the effect of that gas, and influenza, the plaintiff being discharged out of the army a physical wreck, a year convalescing at home, with his mother and father, then bedfast, with the necessity of draining one lung, and a diagnosis of active pulmonary tuberculosis, with no steady work record at all from date of discharge to the present time.

The plaintiff here was in vocational training for periods, having each time been required to discontinue on acconut of his physical condition, from December, 1920, until some time in 1923, the last period of training being in Spokane, Washington, which training plaintiff voluntarily left to go to California, expecting a change of climate to benefit his health. (R. 16). Plaintiff's testimony will show that he was never able to follow training steadily on account of his health.

In the case of United States of America, Appellant, v. Robert H. Albano, Appellee, No. 6908, decided by this court on February 20, 1933, and in referring to vocational training in said opinion, this court said:

> "The appellant further contends that the $150 per month allowed to the appellee for the support of himself and his family during his vocational training period, of approixmately 19 months, should be included in the appellee's earnings. We do not believe that this is income in the sense used by the appellant. The allowance in question was for the maintenance of the appellee and his family during the time that he was in trainng, and we think that it has little or no bearing upon this case, one way or the other."

We submit that this rule is the only reasonable construction of the law in regard to vocational training.

Following 1923 when plaintiff discontinued vocational training, until the present time, we have no period of continuous work, if the evidence of plaintiff is to be believed.

The learned trial court, at least by inference, we submit, in directing the verdict for the defendant, holds that if plaintiff had followed the rules for tuberculars, and had rested without any attempt at work he might have recovered; that inasmuch as plaintiff at-

tempted vocational training and later attempted to work probably destroyed his own chances of recovery, and that this, as a matter of law, disputes the inference to be drawn from the history of his case that he was permanently and totally disabled at the time he was discharged from the army. We concede that such an inference might be drawn in weighing the facts, but that it should not be held to be a fact as a matter of law, but within the province of the jury to determine.

In the Sligh case (31 Fed. (2d) 735) the plaintiff worked, and by so doing may have precluded his chances for recovery, and this court did not bar him from recovering on that account.

In the Meserve case (44 Fed. (2d) 549) the plaintiff attempted to work, and in fact did work, and died, and this court did not hold that his beneficiaries were barred from recovery on his War Risk insurance policy.

On November 7, 1932, this court, in the case of U. S. v. Griswold (61 Fed. (2d) 583) said in the last paragraph of its opinion in said case, on page 586:

> "At the argument we were impressed that the case was controlled by the above-cited cases, but a study of the briefs and record convinces us that there was substantial evidence to go to the

> jury upon the proposition that although plaintiff actually worked for long periods of time, he was not then able to do so nor to do so continuously, and that the case is ruled by our decisions in U. S. v. Sligh, 31 F. (2d) 735; U. S. v. Meserve, 44 F. (2d) 549; U. S. v. Rasar, 45 F. (2d) 545."

It is true that in the instant case there were not a great number of witnesses for plaintiff; also that there were no doctors giving expert testimony who gave opinions of permanent and total disability from date of discharge. We desire to call to the court's attention the fact that both doctors appearing at the trial were Veterans Administration physicians. We submit that any case should not be decided according to the number of witnesses, and that one witness is sufficient to prove any fact, if said witness' testimony is given full credit; that the plaintiff is corroborated in practically everything he testified to, and that his testimony regarding the superficial examinations made by the government between 1920 and 1930 was not disputed, and if his testimony was untrue the defendant could have easily proved it by showing that said examinations were not superficial.

We direct the court's attention to the symptoms the plaintiff testified as having existed from the time he was gassed and had influenza, to the present time i. e., weakness, persistent coughing, expectoration of spu-

tum, pains in chest, nervousness, night sweats, and temperature, and we further direct the court's attention to Dr. Hobson's testimony, Veterans Administration employee since 1919, of the symptoms of active tuberculosis, i. e., loss of weight, temperature, rise in pulse rate, weakness, general lack of ambition, etc.; also to the fact that one with active tuberculosis is imperiling his life by working, as is expressed by both Drs. Hobson and Waller; and we respectfully submit that if plaintff's testimony is true, he had active tuberculosis all this period and by working did imperil his life and health.

We respectfully request this court to rule on the admission into evidence, over plaintiff's objections, of the alleged reports of physical examinations. Plaintiff was denied the right to inquire into the qualifications of said alleged examiners, of the nature and extent of the alleged examination, said defendant merely got into evidence self-serving declarations; and all it would have to do, if the court is sustained in admitting this evidence, would be to fill its file with alleged examination reports and not produce a single witness other than the custodian of the file, nor show any reason for not producing said examiners; and we further submit that said documents are not to be treated as those documents under a government seal, such as records of the War Department, etc.

CONCLUSION

We respectfully direct to the court's attention that the main question to be determined on this appeal is whether there was substantial evidence, and that it is neither the province nor the right of the court to weigh the evidence to determine its convincing force. U. S. Fidelity & Guaranty Co. v. Blake, 285 Fed. 449; that the subsequent history in plaintiff's case conclusively shows that his disability was permanent, and that such history is cogent evidence rightly which should be considered by the jury, and that the action of the trial court in directing a verdict for the government was an invasion of the plaintiff's right to a jury trial, and amounted in fact to a weighing of evidence and the determination of its convincing force in the mind of the trial court, rather than a determination of the fact whether or not any substantial evidence had been shown.

It is respectfully submitted that the trial court erred in directing a verdict and that this case should be reversed and remanded for a new trial.

Respectfully submitted,

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No. 7102

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY D. McCLEARY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

WELLINGTON D. RANKIN,
United States Attorney,
District of Montana.

D. L. EGNEW,
Assistant U. S. Attorney.

D. D. EVANS, Chief Attorney,
U. S. Veterans Administration.

Attorneys for Appellee.

FILED _____, 1933

_____ Clerk.

THURBER'S, HELENA

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STATEMENT OF THE CASE

The statement of the case presented by the appellant is substantially correct excepting that portion on page three of appellant's brief, which is purely argumentative and relates to disputed facts. Briefly, this is an action on a $10,000.00 War Risk Insurance policy applied for by appellant November 16, 1917. This action thereon, was filed April 26, 1932, claiming total and permanent disability of plaintiff from date of discharge, May 9, 1919. The answer raises as a defense, the issues that plaintiff was not totally and permanently disabled and that his policy lapsed on July 1, 1919 for failure to pay the premium thereon.

The cause was tried in the District Court on October 6, 1932. At the close of plaintiff's case defendant moved the court for a directed verdict in its favor, reserving the right to produce evidence on behalf of defendant and to renew the motion at the close of all the evidence. The trial court said (Tr. 56),

> "I think that the court will reserve the right to proceed, with this in mind, and your motion may be renewed at the end of the defendant's case. Pro forma the motion is denied."

Evidence was then submitted on behalf of the defendant. At the close of all the testimony defendant renewed its motion for a directed verdict and at the

close of the argument on said motion the court directed a verdict in favor of defendant from which plaintiff appeals.

The only issue in the case before this court is whether or not the trial court erred in directing a verdict for defendant. The determination of this issue renders the question of the admission and rejection of evidence, raised by appellant's assignments of error V and VI, immaterial.

ARGUMENT

NO SUBSTANTIAL EVIDENCE WAS OFFERED BY PLAINTIFF WHICH REQUIRED SUBMISSION OF THE CASE TO A JURY.

The first four assignments of error relate to different steps in the alleged error of the trial court, the directing of a verdict for defendant and may be answered by the same argument.

The question before this court is whether or not there is substantial evidence in the record that plaintiff was totally and permanently disabled during the life of his war risk insurance policy requiring the court to submit the case to a jury instead of directing a verdict for the defendant.

There is no evidence in the record that McCleary was totally and permanently disabled on July 1, 1919, when his policy lapsed.

In a zealous effort to show substantial evidence of total and permanent disability, sufficient to take this case to a jury, counsel for appellant have garbled and to a considerable extent misquoted in their brief the evidence as shown by the record.

On page 8 of appellant's brief counsel would indicate that McCleary testified he was *treated* by Dr. Duncan Alexander during the period *immediately after his discharge in May, 1919.* The word *treated* was not used by the witness but he said he *consulted* Dr. Alexander and does not say whether or not treatment was prescribed, or given. In fact the deposition of Dr. Alexander shows, (Tr. 34), that he "first examined McCleary in May, 1920", almost a year after his policy had lapsed.

Page 9 of appellant's brief is replete with misquotations of the evidence. Appellant says,

> "Left Spokane and went to California to benefit my health."

The evidence really is (Tr. 16):

> "I thought California might be beneficial to my condition so I went from Spokane to California, to San Jose, where I worked***."

There is a vast difference in going to California to work and to benefit one's health. The witness said he thought California might be beneficial to his condition. Does not state whether financial, social or what and certainly does not use the word health.

Again on page 9 of his brief, counsel stated:

> "Went to San Francisco; did not *attempt* to work for several months, then *attempted* to work, etc. ***."

The plain statement of the witness is (Tr. 17):

> "I went to San Francisco and after several months I went to work***."

There is nothing said by the witness about attempting or not attempting to work.

There is scarcely a page of the statement of evidence in appellant's brief which does not contain unwarranted statements and inferences not contained in the record. One of the most glaring is contained on page 12 of appellant's brief quoting from the deposition of Dr. Alexander. The brief says:

> "Made clinical diagnosis with bacteriological findings of tubercular infection."

The record shows (Tr. 35) the evidence to be:

> "The symptoms were fever, continued cough with expectoration purulent, repeated examina-

tion of which showed *negative for tubercular organisms.*"

"At that time my diagnosis of his condition, clinically and *not from bacteriological findings* was a tubercular infection, which in my judgment was the thing that was prevalent."

And on (Tr. 38) Dr. Alexander said:

"I want the court and jury to understand that the diagnosis I have given was made simply from *clinical findings.* The bacteriological findings *are negative insofar as my records show,* that is so far as tuberculosis is concerned."

This mis-statement of the evidence cannot be passed by us unnoticed.

We also desire to call attention to an important omission of a portion of a sentence by appellant without indicating any omission which entirely modifies a statement on page 15 of his brief. The appellant in giving the testimony of Dr. Hobson, says:

"Taking into consideration the condition, I found when I first examined him I think the plaintiff has been continuously active since 1920."

The record (Tr. 49) shows that the above quotation is only a part of a sentence and what the doctor really did say was:

> "*If it were established in my mind to be correct that continuously since the plaintiff has had night sweats and temperature, cough with expectoration, and later developed positive sputum* taking into consideration the conditon I found when I first examined him, I think the plaintiff has probably been continuously active since 1920."

Comment is unnecessary to show the importance of the italicised portion of the sentence omitted and the false light placed on the testimony by its omission.

NO WITNESS LAY OR MEDICAL TESTIFIED THAT PLAINTIFF WAS TOTALLY AND PERMANENTLY DISABLED PRIOR TO 1932.

Taking from the record the testimony of the witnesses for plaintiff in the order in which they testified it is apparent there is no evidence of total permanent disability in July, 1919.

The plaintiff McCleary did not claim total permanent disability on July 1, 1919, in his testimony.

His testimony as to his vocational training and work record would also refute total permanent disability. His direct statements make it positive that he was not then totally and permanently disabled. He says (Tr. 20) :

"I do not dispute that at the time of my discharge on May 9, 1919, my physical condition was 'Good'."

"I was not discharged for physical reasons." (Tr. 20-21).

"I guess I didn't, at that time, claim I was totally disabled from either gas influenza or tuberculosis." (Tr. 20-21).

The mere statements of defendant that he was not able to work is not sufficient to take the case to a jury.

In the case of United States v. Diehl (C. C. A. 4) 62 F. (2d) 343 at 344 and 345, the court said:

"But there is nothing in that case which holds that *mere general statements by the insured that he was not able to work are sufficient to carry the case to the jury* on the issue of total and permanent disability in the face of positive and uncontradicted testimony that he has in fact worked with reasonable regularity over long periods of time. ***

"But partial disability existing at the time of lapse does not warrant a recovery, even though total disability may subsequently result; and total disability based upon conditions which at the time of lapse do not render it reasonably certain that such total disability will continue through life is not to be deemed permanent, *even though a subsequent change of conditions may render such disability permanent in character.* See Eggen v. U. S., supra.

"While it is shown that he had tuberculosis at the time of his discharge from the Army, it is not shown that his condition was such as to render it reasonably certain that the disease would permanently disable him. On the contrary, the evidence is that shortly after his discharge the disease was found to be in an arrested state. See Nicolay v. U. S., supra.

"For the reasons stated, there was error in denying the motion of the defendant for a directed verdict, and the judgment is accordingly reversed." (Italics ours).

NO WITNESS TESTIFIED THAT PLAINTIFF WAS TOTALLY AND PERMANENTLY DISABLED WHEN HIS POLICY LAPSED.

It is likewise certain that the testimony of plaintiff's wife JOSEPHINE McCLEARY (Tr. 28) throws no light on plaintiff's condition July 1, 1919. They were married in July, 1923, and she testifies:

"I had met Mr. McCleary in Spokane the year before I married him."

She did not know plaintiff until 1922, three years after his policy lapsed.

Appellant, on page 11 of his brief states that plaintiff's testimony is corroborated by his wife in the par-

ticulars he sets forth. She could not have corroborated any of his testimony relating to the period prior to 1922. It is also apparent that her statement as to McCleary being gassed was purely hearsay as the record shows she said "he told me so", (Tr. 28).

Appellant also on page 12 of his brief quotes the witness as saying:

> "I also observed night sweats right away after we were married."

Notwithstanding, the record (Tr. 29) gives the witness' testimony as:

> "I also observed the *indications* of night sweats that he testified to."

We believe that the word "indications" has sufficient significance that it should not have been omitted from appellant's brief.

While the testimony of plaintiff's wife throws no light whatsoever on plaintiff's condition July 1, 1919, we think it does prove that plaintiff was not totally and permanently disabled at a later date. She testified (Tr. 31):

> "I should think that we might understand that he started to work there in the summer in June or July of 1924, in San Francisco, working for the Pomin Corset Company, doing the same thing show card writing and display work. His salary

I think was about the same, $30.00 (weekly). *He continued in the employment of the Pomin Corset Company for over three years.*"

The deposition of DR. DUNCAN L. ALEXANDER (Tr. 33) contains nothing upon which total permanent disability could be predicated July 1, 1919, or at any other time.

Dr. Alexander's testimony was from the records of his office showing that he first examined McCleary on May 16, 1920. He was under Dr. Alexander's care until July 19, 1920, a period of approximately 64 days. Dr. Alexander says, (Tr. 34):

"I found him suffering from a cough, purulent expectoration, temperature continued."

"I visited the patient during that time, examined several specimens of sputum, myself, and had two sputums examined by laboratory, at Dr. Hal Bieler's laboratory, the sputum *in all cases being negative for tubercular organisms* but continued (contained) staphylococci and streptococci." (Tr. 34).

"I further examined the patient on the third day of July; the name here is in the bookkeeper's handwriting, but the notation is mine. The symptoms were fever, continued cough with expectoration purulent, repeated examination of which *showed negative for tubercular organisms.*" (Tr. 35).

"At that time my diagnosis of his condition, clinically and not from bacteriological findings, was a tubercular infection, which in my judgment was the thing that was prevalent. Asked if I would classify that as active pulmonary tuberculosis, well it was certainly very active, diseased condition at that time, but my *diagnosis was clinical and not with bacteriological evidence.*" (Tr. 35).

"I must have taken into consideration the history *that he gave me* at the time. All the symptoms I found existing at the time I had Mr. McCleary under observation were fever and a continued cough with expectoration, difficulty in breathing, continued temperature, pain in the chest, with dullness in one of the lungs. The pain in the chest was partially a pleurisy pain. *The other symptoms that I have given might be symptoms that would be found in asthma or bronchitis. I want the court and jury to understand that the diagnosis I have given was made simply from clinical findings. The bacteriological findings* are negative, in so far as my records show, that is, *so far as tuberculosis is concerned.* To the best of my remembrance I have not seen the plaintiff professionally, since July, 1920." (Tr. 38).

Dr. Alexander did not positively diagnose plaintiff's condition in 1920 as active tuberculosis, much less testify as to its permanency at any time or particularly in July, 1919.

The strongest the doctor would go when asked if he would classify the condition of plaintiff as active pulmonary tuberculosis (Tr. 35) was that it was very active diseased condition at that time "but my diagnosis was clinical and not with bacteriological evidence".

There is also nothing in the testimony of MRS. E. M. McCLEARY, mother of plaintiff, which would inindicate that plaintiff was permanently disabled. She testified, (Tr. 41 and 42):

> "Asked if I have noticed any change in his condition now from what it was when he first got out of the army. Well, in appearance he has improved; he is improved now over what he was when he first came home."

The testimony of DR. G. D. WALLER (Tr. 43) shows that he did not examine plaintiff until March 1932. He testified that at that time he considered plaintiff totally and permanently disabled from tuberculosis. He, of course, would not be competent to testify that plaintiff was totally and permanently disabled in July, 1919, and he offers no such testimony. In fact his testimony would indicate that plaintiff was not permanently and totally disabled.

The doctor testified (Tr. 45):

> "A great many men, by proper care and proper

> sanitation, work over long periods of years with active tuberculosis. In certain stages active tuberculosis is curable." (Tr. 45).

As to the presence of staphylococci and streptococci in the sputum tests made by Dr. Hal Bieler, the witness said:

> "I will say that it would not mean much of anything. It wouldn't mean that he had tuberculosis and it wouldn't mean that he did not have it." (Tr. 46).

As to whether or not plaintiff had tuberculosis in 1920 when examined by Dr. Alexander, the strongest statement Dr. Waller would make was (Tr. 47):

> "As to the most I would say being that it is possible he had tuberculosis in 1920, I would say it is probable."

DR. JAMES D. HOBSON testified for the plaintiff. There is nothing in his testimony that would tend to prove total permanent disability of plaintiff before 1932. He did not examine plaintiff until a few months before the trial. This witness did not testify positively to plaintiff's condition in 1932 even. Appellant's brief (pp. 14 and 15) states that this doctor testified:

> "He had fibrosis tuberculosis active***. He is totally disabled; it is reasonably certain that

he will continue totally disabled the remainder of his life."

The record shows, however, that the testimony is:

"***He I thought had a fibrous tuberculosis which was active *at that time.*" (Tr. 47),

and

"*I think* he is totally disabled." (Tr. 48),

and

"*I think* it is reasonably certain the plaintiff will continue totally disabled the remainder of his life." (Tr. 48).

The strongest statement made by the witness, a portion of which sentence was omitted by appellant on page 15 of his brief is:

"*If it were established* in my mind to be correct that continuously since *the plaintiff* has had night sweats and temperature, cough with expectoration and later developed positive sputum, taking into consideration the condition I found when I first examined him *I think* the plaintiff has *probably* been continuously active since 1920." (Tr. 49).

This statement is no evidence of total permanent disability in 1919. In fact it is pure speculation based upon a supposition which the doctor does not say existed and if it did exist he thinks the plaintiff has

probably been active since 1920, not since 1919 when the policy lapsed.

This doctor further showed in cross examination that he did not think plaintiff was totally or permanently disabled prior to 1932. He testified (Tr. 51):

> "I think that the majority of cases of chronic tuberculosis show periods of a rest when they are apparently not active. No one can say how long those periods of rest will be—an indeterminate time; it depends on the personal equation and the resistance and upon the circumstances. *The condition might, indeed, become arrested and stay arrested for the balance of his lifetime and of course, any time less, ten years or five years, when he would be handicapped little or none by such disease,*—that is true,"

and the witness further said, (Tr. 52):

> "Judging, then, from such testimony as I have already heard, *I think that no one could say positively that the plaintiff had been active without a period of remission, since 1920, with no other evidence to go upon.*"

Upon re-direct examination of the witness by counsel for plaintiff, the witness said, (Tr. 53):

> "I don't recall having testified that it is my belief that the plaintiff has been continuously active since he had the influenza; I think he has had tuberculosis all the time, but may have had

periods of quiesence, which occur in a lot of cases, of course, quiesence means inactive, arrested."

No other evidence was submitted by plaintiff except the testimony of the foregoing witnesses and we submit that there is no substantial evidence of total permanent disability in the record. To say that the plaintiff was totally and permanently disabled on July 1, 1919, is pure conjecture and surmise. The case should not have gone to the jury, and the judgment of the trial court should stand. In the case of Wire vs. United States (C. C. A. 5) 63 Fed. (2d) 307, 308 the court well said:

> "While it is certainly the law that the question of total and permanent disability, where there is any evidence to support a finding of it, is for the jury, it is also clear that *the court must not submit a case where there is nothing but conjecture and surmise to rest a verdict on.*
>
> "It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact. * * * Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. *He is not a mere moderator of a town meeting*, submitting questions to the jury for

determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. *He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment.* Patton v. Texas & R. P. Co., 179 U. S. 659, 21 S. Ct. 275, 276, 45 L. Ed. 361." (Italics ours).

TUBERCULOSIS IS CURABLE AND NOT NECESSARILY TOTALY AND PERMANENTLY DISABLING.

Even if plaintiff had tuberculosis when discharged there is no evidence that it would permanently disable him. In United States v. Rentfrow, et al, (C. C. A. 10), 60 Fed. (2d) 488 at 489, the court says:

"We are of the opinion that this case is ruled by the decisions of this court in Nicolay v. United States, 51 F. (2d) 170; Hirt v. United States, 56 F. (2d) 80; and Roberts v. United States, 57 F. (2d) 514. There is evidence sufficient to support the trial court's finding that the insured was suffering from pulmonary tuberculosis when he was discharged from the Army. There is no evidence, however, of the permanence of the disability. The only direct evidence on the subject

is that of Dr. Calhoun, who testified that in 1922 his condition was not a permanent one, and that the disease would probably have been arrested if the insured had followed the treatment suggested. It is suggested by appellees that liability exists unless evidence affirmatively discloses that the condition was not a permanent one. We are cited to Humble v. United States, 49 F. (2d) 600, 601, where the District Court allowed a recovery because it was 'impossible to say that the disease would not continue active for the rest of his life.' But the burden of proof is upon the plaintiff to prove that the disability was permanent, that is, 'founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.' *This burden is not carried by leaving the matter in the realm of speculation.*"

* * * * * *

"An incipient tubercular stands at a crossroads: If he continues his ordinary activities, his condition is a hopeless one. On the other hand, if he will follow a program of complete rest and wholesome nourishment for an indicated period, the chances are strongly in favor of an arrested condition and a substantial cure. Many times the choice is a hard one, particularly when the economic circumstances of the insured are considered. *But we cannot believe that liability upon these contracts of insurance should be determined by the conduct of the insured after the policy has lapsed, nor by economic circumstances*

which may influence that conduct. We can find no support, in this record, for a finding that tuberculosis with which insured was afflicted had progressed to the incurable stage when his policy lapsed in August, 1919. For that reason, the motion of the government should have been sustained. For a strikingly similar case, see Eggen v. United States (C. C. A. 8) 58 F. (2d) 616." (Italics ours).

THE WORK RECORD OF PLAINTIFF DISPROVES TOTAL PERMANENT DISABILITY.

The record discloses that plaintiff was gainfully employed over a considerable period of time. His testimony shows (Tr. 21):

> "I made a claim to the United States government. As to my stating in that claim made, it is said, on the 18th of June, 1920, that from the time of my discharge from the Army, in answering the questions concerning my occupation since discharge, and the dates, I stated that I was farming from May, 1919, to July, 1919 at $75 per month, and that I worked at the carpenter trade in July, 1919, for two weeks, and asked what I have to say as to that employment. Well, in farming, my father had a little five-acre tract in Twin Falls, and I guess that's what I meant by farming."

"I married in 1923, which was after my training period. (Tr. 21). *At the time I was married I was receiving $35.00 a week or somewhere around there in wages. $30 or $35 a week as I remember it, at San Jose;* I believe I had been working for two, or three months, as I remember it, for these people at San Jose, before I was married, at the figures stated." (Tr. 22).

"I was receiving very little compensation or support from the Government, as I recall it; at the time of my marriage, I believe $10 a month."

"I believe I started in this training (vocational) the late fall of 1920." "I received $100 a month from the Government." (Tr. 22). "As I remember it, *I had that training about nine months.* As I remember it, I started in training again about three or four months later and continued for approximately nine months or a year in Spokane. I quit training because I wanted to go to California (Tr. 22-23) * * *." "I thought California might be beneficial to my condition so I went from Spokane to California to San Jose, where I worked for Al Harkness Sons at show card writing, off and on, as I remember, for about a year." (Tr. 16).

"After quitting that place I went to San Francisco and after several months, *I went to work there for the Pomin Corset Company, doing the same kind of work* show card writing." (Tr. 17).

"The next job I had was with Hale Brothers, in San Francisco." (Tr. 17).

It appears that McCleary worked for Hale Brothers at show card writing and selling radios in the radio department. (Tr. 17 and 18).

The testimony of JOSEPHINE McCLEARY, wife of plaintiff, shows (Tr. 30):

> "I was married in July, 1923. Shortly after that we returned to San Jose to live. During that time my husband was occupied in doing show card writing. He stayed there in employment in San Jose after we were married until the following April which would be April, 1924. During that period he received a salary or wages of $30 a week." (Tr. 30).
>
> "In San Francisco he worked for the William C. Pomin Corset Company." (Tr. 30).
>
> "I should think we might understand that he started to work there in the summer, in June or July of 1924, in San Francisco, working for the Pomin Corset Company, doing the same thing, show card writing and display work. His salary I think was about the same, $30.00. *He continued in the employment of the Pomin Corset Company for over three years.*" (Tr. 31).

We contend that the work record of plaintiff disapproves total permanent disability.

The case of United States vs. Kims (C. C. A. 9) 61 Fed. (2d) 644 at 648, decided by this court is a much stronger case for the plaintiff than the case at

bar. In that case three doctors testified that plaintiff was totally and permanently disabled from date of discharge and this court reversed a judgment for plaintiff using the following language:

> "Plaintiff's right of recovery, if at all, is upon contract. He must establish permanent and total disability prior to the time his policy lapsed for nonpayment of premiums. Whatever may have been the effect of subsequent developments of his ailment or disease, the record of his employment with the Simmons Bed Company is such that he could not have been totally and permanently disabled within the definition of those terms during the time of such employment. This conclusion is in accord with the views expressed by this court in United States v. Seattle Title Trust Co., 53 F. (2d) 435, and United States v. Rice, 47 F. (2d) 749. The following cases also are in point: United States v. Harrison (C. C. A.) 49 F. (2d) 227; Ross v. United States (C. C. A.) 49 F. (2d) 541; Nalbantian v. United States C. C. A.) 54 F. (2d) 63. Judgment reversed."

The Court held in United States vs. Pullig (C. C. A. 8) 63 Fed. (2d) 379 at 383, as follows:

> "The liability of the government is contractual, and that contract provides for payment to the insured for total and permanent disability occurring during the life of the policy. It did not insure against partial disability. The fact that witnesses expressed the opinion that insured was totally

disabled does not overcome the undisputed facts showing that the insured actually worked with sufficient regularity that substantial earnings resulted therefrom, even though he suffered interruptions in carrying on his business and discomfort in so doing. Such opinions cannot be accepted as constituting substantial evidence. United States v. Harth (C. C. A.) 61 F. (2d) 541; United States v. Fly (C. C. A.) 58 F. (2d) 217; Nicolay v. United States (C. C. A.) 51 F. (2d) 170, 173; United States v. Peet (C. C. A.) 59 F. (2d) 728; United States v. Wilson (C. C. A.) 50 F. (2d) 1063, 1064; United States v. Lyle (C. C. A.) 54 F. (2d) 357; United States v. Martin (C. C. A.) 54 F. (2d) 554, 556; Long v. United States (C. C. A.) 59 F. (2d) 602; United States v. Barker (C. C. A.) 36 F. (2d) 556; Nalbantian v. United States (C. C. A.) 54 F. (2d) 63; United States v. Hairston (C. C. A.) 55 F. (2d) 825; United States v. Rice (C. C. A.) 47 F. (2d) 749.

Again in Roberts vs. United States (C. C. A. 10) 57 Fed. (2nd) 514 at 515-16 the court said:

> "The cited case is in many respects similar in facts to the case at bar, and it was there held that, in the face of a showing of an employment in a substantially gainful occupation for a considerable period of time by one seeking relief under the terms of a policy as here considered, *even though he may have shown himself to be suffering from tuberculosis,* he had not dis-

charged the burden placed upon him as plaintiff in the case of showing that he was totally and permanently disabled at all times necessary to mature the policy. The authorities are exhaustively cited in this well-considered opinion of the court and a reiteration of them here would serve no useful purpose. A case somewhat similar as to facts in which relief was denied to the plaintiff is United States v. McLaughlin, 53 F. (2d) 450 (C. C. A. 8). A more recent case in our own court is Hirt v. United States, 56 F. (2d) 80 (C. C. A. 10), decided January 26, 1932. Both of the Tenth Circuit cases stress the point that it is incumbent upon the plaintiff to produce some substantial proof that, admitting plaintiff was suffering from the disease complained of before the time that his policy elapsed, it must also be established that his disability was then one which would with reasonable certainty continue throughout his life." (Italics ours).

That the plaintiff may now be totally and permanently disabled is of no avail. His policy lapsed before it matured.

In Eggen vs. United States (C. C. A. 8) 58 Fed. (2nd) 616 on pages 619-620, the court said:

"The subsequent death or subsequent permanence of the disability does not always create an inference that the disability was permanent before the lapse of the policy. If it did, then whenever in one of these cases there was evidence of

total disability from a certain disease before lapse, and death or total and permanent disability from a continuation of the same disease after lapse, the case would be for the jury, regardless of what the disease may have been. If, at the time of the lapse of the policy, all the conditions upon which the total disability was founded then failed to make it reasonably certain that the disability would continue throughout the lifetime of the insured, the policy did not mature. If it did not mature, it lapsed, and, if subsequently and as the disease progressed, other conditions arose which made it reasonably certain that the insured could never recover, those later conditions cannot be used to mature a policy which had ceased to exist. A man with influenza, mumps, measles, whooping cough, or scarlet fever may be a totally disabled man (and a certain percentage of deaths result from those diseases) but no one could properly contend that an insured under a policy of war risk insurance so totally disabled had a matured policy on the day the disability occurred, if he thereafter died or the disability subsequently became permanent as a result of the disease or as the result of his own failure to take treatment, or the combined result of both." * * *

"In this case, while the question of the sufficiency of the evidence to establish total disability is not free from doubt, we think it would have justified a finding that the insured was totally disabled as a result of incipient tuberculosis at the time his policy lapsed, and that this disease did

not become arrested, and later caused permanent disability and finally death. We think, however, there was no substantial evidence that the conditions which existed while the policy was alive made it reasonably certain that the total disability would last throughout the lifetime of the insured. The medical testimony of the appellant did not establish the existence of such conditions prior to October 1, 1919. The probabilities then were that the insured would recover. He was advised by his doctor, in September, 1919, to take treatment so that he might be cured. The testimony introduced by the government, and not disputed, indicated that the chances for the recovery of a man in his condition—assuming it to be as described by the appellant's evidence—prior to the lapse of the policy, were at least 8 to 2; and courts recognize the fact that tuberculosis in its incipient stage is usually not an incurable malady. See Nicolay v. United States, supra; Hirt v. United States, supra. A finding that the insured was permanently disabled on October 1, 1919, or prior thereto, would not only be without substantial support in the evidence, but would necessarily be based solely upon speculation and conjecture."

This Court has held in the case of United States vs. McCreary (C. C. A. 9) 61 Fed. (2nd) 804 at 807:

"If appellee was not totally and permanently disabled at discharge and all of the time since, his present condition and reasonable certainty as to

> his future condition is immaterial. There is no evidence carrying a quality of proof or having fitness to produce conviction that reasonable minded persons may fairly differ as to whether or not it proves the fact in issue. There is no such evidence as total and permanent disability."

And again in the same case we think the statement of this court is decidedly applicable to the case at bar when it said (P. 808):

> "The court is not concerned with the present condition of the appellee, except as it relates to total and permanent disability at the date of discharge, and at all times since that date, and the disability must have had its origin at or prior to the date of discharge, be total, and reasonably certain to be permanent during lifetime. And there is no substantial evidence in support of this fact."

THE TRIAL COURT DID NOT ERR IN THE ADMISSION OR REJECTION OF EVIDENCE.

Appellant practically abandons assignments of error Numbered 5 and 6, as only a half page of his brief is devoted to discussing them and no reference is made to the record. The assignments do not properly place any issue before this court for the reason that they do

not quote the substance of the evidence admitted and rejected.

The decision of the issue raised by the first four assignments of error will also render assignments five and six immaterial.

The objection by appellant was to the introduction of examination reports of appellant made by government doctors, the records being a part of the official records of the Veterans Bureau. We contend there was no error in the admission of these records and believe that this matter is fully determined in United States vs. Wescoat 49 Fed. (2nd) 193-195 where the Court said:

> "We think it perfectly clear that these papers and the entries thereon fall within the exceptions to the hearsay rule";

and in Long vs. United States (C. C. A. 4) 59 Fed. (2nd) 602, these papers are held admissible and in that connection the court said on pages 603 and 604:

> "As to necessity, these reports of examining physicians are made ordinarily by physicians of the Veterans Bureau who are either not available as witnesses or whose testimony, if they are available, can be secured only at great trouble and expense. Moreover, their testimony when produced is ordinarily a mere recital of what is contained in their reports, to which they must look for the

purpose of refreshing the memory; and every one with experience in conducting litigation knows that as a matter of fact such reports are more reliable than the memory of the witnesses who made them, and that, if a witness without giving good reason therefor should contradict the statements contained in the reports, the reports would be accepted by any trier of facts in preference to the oral testimony. The examining physicians of the government examine hundreds of disabled soldiers. The written record of the examination made at the time is undoubtedly more trustworthy than the treacherous memory of a busy man dealing with many cases having many points of similarity. It is clear, therefore, not only that it is necessary as a practical matter that these reports be received if evidence is to be had of the matters which they relate, but also that they are more dependable than would be the oral testimony of the witnesses who made them, and are, in reality, the best evidence obtainable as to such matters."

CONCLUSION

We challenge appellant to show from the record any evidence whatsoever, medical, lay, documentary or otherwise that plaintiff was totally and permanently disabled July 1, 1919. To conclude from the evidence that plaintiff was then totally and permanently disabled is purely a matter of conjecture and speculation.

The government did not insure plaintiff against having tuberculosis but against death or total permanent disability. To hold that in a case of tuberculosis which becomes totally and permanently disabling thirteen years after the lapse of the policy of insurance, the government is liable under its contract based upon total and permanent disability while the policy is in force, is certainly an unwarranted interpretation of that contract.

From the evidence before it there was no alternative for the trial court. A verdict for defendant was properly directed in a carefully considered opinion and we respctfully submit that the judgment of the trial court should be affirmed.

Respectfully submitted,

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No. 7102

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY D. McCLEARY,

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vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION

HON. GEORGE M. BOURQUIN, JUDGE

Supplemental Brief

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FILED _____, 1933

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STATEMENT OF REASONS FOR PETITION TO File SUPPLEMENTAL BRIEF

Subsequent to the filing of appellant's brief, and on May 1, 1933, this court handed down the decision in the case of Joseph Falbo vs. United States of America, No. 6965, which might be considered as controlling in this case. For that reason appellant respectfully asks leave of this Court to file this supplemental brief, and respectfully calls to the Court's attention:

The trial court in directing a verdict for defendant relied principally on the case of Nicolay vs. United States, 51 Fed. (2d) 170. On the 28th day of March, 1933, the Circuit Court for the Tenth Circuit, in the case of United States, Appellant, against Gertrude Thomas, Administratrix of the Estate of Burke Thomas, Deceased, and Martha A. Thomas, Appelles, No. 744, handed down an opinion, and that Court said in part as follows:

> "It has been held, by this and other Courts, that the plaintiff must establish, by substantial proof, that the insured was totally and permanently disabled while the policy was in force; that proof of minimal or incipient tuberculosis during that period, without more, is not sufficient to carry the case to the jury. It has likewise been held that the subsequent employment of the insured may be of such a nature and duration as to refute conclusively any claim of such disability.

Nicolay v. United States (C. C. A. 10), 51 F. (2d) 170; Hirt v. United States (C. C. A. 10) 56 F. (2d) 80; Roberts v. United States (C. C. A. 10), 57 F. (2d) 514; United States v. Rentfrow (C. C. A. 10), 60 F. (2d) 488; Storey v. United States (C. C. A. 10), 60 F. (2d) 484; United States v. Fitzpatrick (C. C. A. 10), ... F. (2d) ..... (decided January 3, 1933); United States v. Peet (C. C. A. 10), 59 F. (2d) 728; Eggen v. United States (C. C. A. 8), 58 F. (2d) 616; United States v. Diehl (C. C. A. 4), 62 F. (2d) 343; United States v. Harth (C. C. A. 8), 61 F. (2d) 541. We adhere to the doctrine of these cases; the government contends that such adherence requires a reversal of the present case.

"Counsel for appellees have brought to our attention valuable excerpts from the Report on Tuberculosis made in 1932 by Dr. Arthur Salusbury MacNalty, Senior Medical Officer for Tuberculosis of the Ministry of Health of London; and from the recent work of Dr. Maurice Fishberg, Chief of the Tuberculosis Service, Montefiore Hospital, on Pulmonary Tuberculosis. From these, it appears that the effect of tubercle bacilli varies widely with the individual infected therewith, and that it is impossible to make a definite prognosis at the outset of the disease. It follows, therefore, that while we are concerned only with the condition of the insured when his policy lapsed, subsequent events are of vital import in determining his then condition."

The modification made by the Tenth Circuit, if such it may be termed, is exactly what the plaintiff is contending for in this case. ~~The medical excerpts is contending for in this case~~.

ARGUMENT

The medical excerpts referred to by the Tenth Circuit in said opinion are hereinafter quoted. Dr. Arthur Salusbury MacNalty, Senior Medical Officer for Tuberculosis Ministry of Health, London, in his 1932 report on tuberculosis states:

> "Tuberculosis is still a killing and tragic disease, the 'Captain of the Men of Death,' as Bunyan called it." (MacNalty Report on Tuberculosis for 1932, page 2).

As I read the Falbo case, I do not consider that it was the intention of this Court to lay down in its findings, principles of fact in that case as principles of law, conclusive upon subsequent litigants. Obviously, this could not be done with the disease of tuberculosis, for it is one of the diseases about which even the greatest specialists admit there is much yet to be learned.

Dr. Maurice Fishberg, Chief of the Tuberculosis Service, Montefiore Hospital, and its county sanitorium for incipient tuberculosis, is an internationally recognized authority on tuberculosis and in his monumental

work on pulmonary tuberculosis (1932 Edition) states:

"Attempts are being made to unravel the mystery why when several persons are exposed to infection with tubercle bacilli, and infected, some may become sick, while most remain in comparative, or complete, health; why in familiar tuberculosis, a few descendants of phthisical parents will develop tuberculosis disease and perhaps die as a result of it, while several others, equally exposed to infection and raised in the same environment, remain healthy; why of those who become sick, some, though very few, suffer from a very acute and rapidly fatal disease, like military tuberculosis, or pneumonic phthisis, or exudative lesions which pursue a progressive course terminating fatally sooner or later; while many others have chronic fibroid lesions which are more or less benign and compatible with moderate activity in life; why, in still others, the virus produces evidence changes in the lungs and pleura, but the process is abortive, the patient and his physician knowing little or nothing of the infection. Reasons are sought for the preference of the virus to attack in some people the lungs, in others the glands, joints, bones, or serous membranes of the chest, abdomen, or the cerebrospinal axis." Fishberg, Volume 1, page 114.

"Attention has recently been turned to accessroy non-parasitic causes of phthisis, among which there are many, including endogenous, such as

> heredity, anatomical and biochemical peculiarities of the individual, etc., and also exogenous, including environmental peculiarities, such as economic conditions, includng occupaton, housing, nourishment, etc., and also the geographical milieu. As will be seen from the succeeding pages, the results have so far been very meagre, but when a bacteriologist of the magnitude of Theobald Smith is constrained to say that non-parasitic factors are necessary conditions in the origin of infectious diseases and far outweigh the living agent in etiological significance, it is clear that they are worthy of intensive study." Fishberg, Pulmonary Tuberculosis, Volume 1, page 115, 1932 Edition.

Since tuberculosis specialists make statements like the above in regard to tuberculosis, it occurs to us that it is extremely hazardous for courts and lawyers to make any final and conclusive generalization of facts in regard to it.

The common run of man's conception of tuberculosis, covering a period of 5,000 years or until a very recent time, was covered by the description of the disease given by Dickens in Nicholas Nickleby, to-wit:

> "There is a dread disease which so prepares its victim, as it were, for death; which so refines its grosser aspect and throws around familiar looks unearthly indications of the coming change; a dread disease in which the struggle between soul

and body is so gradual, quiet and solemn and the result so sure, that day by day, and grain by grain the mortal part wastes and withers away so that the spirit grows light and sanguine with its lightening load, and, feeling immortality at hand, deems it but a new term of mortal life; a disease in which death and life are so strangely blended that death takes the glow and hue of life and leaves the gaunt and grisly form of death; a disease which medicine never cured, wealth never warded off, or poverty could boast exemption from; which sometimes moves in giant strides and sometimes at a tardy sluggish pace but, slow or quick, is ever sure and certain."

MacNalty states:

"The description of Caroline Helston's illness was penned by Charlotte Bronte from sad experience of pulmonary tuberculosis, responsible for the death of her gifted sister, Emily * * * 'With all this care, it seemed strange the sick girl did not get well; yet such was the case; she wasted like any snow-wreath in thaw; she faded like any flower in drought.' (Shirley, Chap. XXIV)."

MacNalty also reports that Laennec, the physician who discovered auscultations as applied to the diagnosis of tuberculosis and who succumbed to the disease, wrote:

"It has been shown above, that the cure of

> phthisis (tuberculosis) is not beyond the powers of nature, but it must be admitted, at the same time, that art possesses no certain means of attaining this desirable end." MacNalty, A Report on Tuberculosis, 1932, pages 2-3.

We appreciate that good results have been secured by rest, fresh air and proper nourishment, and this is more pronounced at the present date, that is, 1932 than in 1919, for the reason that great advances have been made in the prevention of the spread of tuberculosis and also in its treatment.

That tuberculosis is still a dread and fatal disease cannot be questioned, because it is the disease that causes ten per cent of all the deaths that occur among civilized people. These figures, however, are for the population as a whole, including the young, middle-aged and the old, and male and female, but when we consider the position of the World War Veteran, which is that of early manhood, the age of which is from about 20 to 35, we find that tuberculosis is the most destructive disease among us.

In the year 1930, according to the United States census, the total deaths from tuberculosis in the United States Registration Area, which embraces practically the whole United States, among males between the ages of 20 and 35 amounted to 13,722, while only

4,497 were caused by heart disease, 1,257 by cancer, 1,960 by nephritis, 693 by cerebral hemorrhage, and 4,941 by pneumonia, for males of that age.

Thus we find that between the ages of 20 and 35 in the Registration Area of the United States that tuberculosis caused more deaths than heart disease, cancer, nephritis, cerebral hemorrhage and pneumonia combined, the total for those diseases being 13,348, while tuberculosis caused 13,722 deaths. Mortality Statistics, 1929, pages 196-219, U. S. Dept, of Commerce.

So, among the five leading causes of death in the United States (accidents excluded) among men between 20 and 35 years of age, that tuberculosis not only leads all others but caused more deaths than the remaining four leaders combined.

For the year 1929, in England and Wales, 33.2 per cent of all the deaths among the males between the ages of 25 and 35 were caused by tuberculosis, and of the deaths occurring between the ages of 15 and 25, the percentage caused by tuberculosis was 33.4. See MacNalty, A Report on Tuberculosis, 1932, page 6.

No country in the world has made as much progress in the prevention and treatment of pulmonary tuberculosis as England. As early as 1912 a national act was passed providing for examinations and treat-

ments, not only of cases that had been diagnosed as tubercular, but of suspects, and still we find that 33 per cent of all the deaths occurring among the male population between the ages of 15 and 35 in England and Wales during 1929 were caused by tuberculosis. In regard to the efficacy of even sanitorium treatment, we find that the experience of England for the year 1929 shows that where 35,550 were admitted, only 18 per cent were discharged in a quiescent condition, and that although 13,637 were admitted without a positive sputum, only 37 per cent of the 13,637 of those who did not have a positive sputum on admission were discharged from the institutions in a quiescent condition. MacNalty, A Report on Tuberculosis, 1932, page 87. After giving numerous statistics MacNalty states:

> "Although sanatorium treatment may secure quiescence of the disease in a reasonable proportion of cases a definite tendency to relapse remains. It is therefore necessary in attempting to assess the true value of sanatorium treatment, to study the after-histories of patients." MacNalty, A Report on Tuberculosis, 1932, page 90.

Fishberg states, in speaking of an arrested case of tuberculosis, as follows:

> "If the improvement has been attained through careful treatment in a favorable environment, the

test is whether the patient remains in good condition for some time after returning to his old environment without suffering a relapse of the constitutional symptoms. The test, in other words, is duration; improvement counts if it lasts without special treatment." Fishberg, Pulmonary Tuberculosis, 1932 Edition, Volume II, page 247.

And he also states:

"Indeed, I have been struck with the fact that when a patient who recovered from phthisis (tuberculosis) is unable to pursue the vocation for which he has been trained for many years, he will not do well, even if he remains idle indefinitely." Fishberg, Volume II, page 308.

And then he states:

"On the whole, it appears that cured patients do best when returning to their old vocations for which they have been trained, and at which they can earn the most with the least possible effort. It may be said that, with some striking exceptions, if a patient is not able to pursue his former line of work he is altogether disabled." Fishberg, Volume II, page 309.

Fishberg also reviews figures having to do with treatment of patients of their after histories and points out that of 1914 persons given sanatorium treatment in the year 1914 under Dr. Taylor, Tuberculosis Officer for the Country Borough of Halifax, by 1920, or

six years later, 76.5 per cent were dead and of the remaining 23.5 one-half were unable to work. Fishberg, Volume II, page 354.

Specialists tell us that 95 per cent have minimal or incipient tuberculosis and have an activity sometime during their lives, but in the great majority of these cases, the patients are not sick with the disease of tuberculosis like Harry D. McCleary is and has been. The whole point is whether the tubercular bacilli makes the individual sick. If it does, he has a disease of tuberculosis, and not the so-called "incipient tuberculen."

Dr. Fishberg states as follows:

> "It must, however, be mentioned here, a point which will be discussed in detail later on, that in human beings infection alone is not sufficient to produce disease; after all, disease occurs only in a comparatively small proportion of persons infected with tubercle bacilli. In other words, while there is no tuberculosis without tubercle bacilli, these micro-organisms harm only those who are predisposed to the disease. We are more and more becoming convinced that phthisiogenesis is more a problem of predisposition than of bacterial infection." Fishberg, Volume 1, page 112 (1932 Edition).

When tubercular condition once develops so as to cause the patient to exhibit the symptoms which it is

admitted, or at least not contradicted, Harry D. McCleary had before he ceased paying premiums on his insurance, it is a disease disabling in character and deadly in its consequences, "The Captain of the Men of Death."

We submit that there is no speculation now after 14 years, that Harry D. McCleary's pulmonary tuberculosis, in 1919, was permanent. This has been proved by subsequent events. According to the tuberculosis experts above quoted, nothing but speculation in that regard could have been made, in 1919 or 1920. There might be some speculation now that if McCleary had been in a hospital and under prescribed treatment from the day he was discharged from the army until now, his condition might not be quite so far advanced, but for this Court to hold, as a matter of law, that McCleary was not permanently disabled in 1919 and take this case from the jury and not permit it to consider his subsequent history to determine whether the condition was permanent in 1919, we submit, is to simply hold that, as a matter of law, no tuberculosis case can be proved permanent until at some specific date after the lapsation of many years, or until the patient is dead.

It is uncontradicted in this case that McCleary had five months hospitalization for inhaling of poisonous

gases and influenza, before he was discharged from the army. Certainly this would make his case distinguishable from an incipient tubercular, as classified by the experts, who never became sick.

We respectfully submit that the jury should be permitted to take into consideration all the evidence in this case and determine whether or not McCleary was permanently and totally disabled when he was discharged from the army in 1919.

Respectfully submitted,

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No. 7102

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY D. McCLEARY,

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vs.

UNITED STATES OF AMERICA,

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION

HON. GEORGE M. BOURQUIN, JUDGE

Petition for Rehearing

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FILED _____, 1933

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THURBER'S, HELENA

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TO THE HONORABLE CURTIS D. WILBUR, WILLIAM H. SAWTELLE and JULIAN W. MACK, Circuit Judges:

Comes now the appellant in the above entitled cause and petitions this honorable court that it reconsider its opinion heretofore filed in the above entitled cause, and that it grant the appellant a rehearing herein, and bases his petition upon the following grounds:

I.

The court based its opinion and decision upon a misconception of the evidence in the case in that there was substantial evidence of permanency and that this was not a case of incipient tuberculosis.

II.

The court miscontstrued the decisions of the Tenth Circuit Court of Appeals as is shown by the latest decision of the Tenth Circuit Court in the case of *United States v. Thomas.*

III.

The court did not give proper weight to the fact that tuberculosis is still a dreadful and killing disease.

IV.

The court did not properly distinguish this from

other tuberculosis cases, and gave too strict a meaning to the word "permanent."

V.

The court did not give proper evidentiary value to the fact that permanence may be shown by continuation of a fact—in this case, total disability.

VI.

The court invaded the province of the jury and weighed the evidence.

ARGUMENT

THE COURT BASED ITS OPINION AND DECISION UPON A MISCONCEPTION OF THE EVIDENCE IN THE CASE IN THAT THERE WAS SUBSTANTIAL EVIDENCE OF PERMANENCY AND THAT THIS WAS NOT A CASE OF INCIPIENT TUBERCULOSIS.

There was positive testimony by Dr. Hobson in behalf of the plaintiff that he was suffering with active pulmonary tuberculosis since he was gassed and had influenza while in the service and before his policy, herein sued upon, would have lapsed for non-payment of premium. We find in the record in this case the following testimony by Dr. Hobson:

"***The symptoms of active tuberculosis are loss of weight, temperature, rise in pulse rate, weakness, general lack of ambition, certain physical findings in the lungs, consisting of impaired resonance with rales, and a positive sputum, are the generalized symptoms of active tuberculosis. If the evidence shows that McCleary had all of these symptoms with the exception of the positive sputum, during any period of time, as to the probability being that he was active, I will say, considering his history of influenza and his history of pleurisy with effusion, I would consider that he has been active since that time, for the reason that a great many cases of tuberculosis follow a severe influenza with pro-bronchial involvment." (R. 50)

Dr. Hobson further testifies:

"***It is entirely possible for one with tuberculosis to work or follow an occupation; it is so possible even with active tuberculosis. It would, however, very much endanger his life to do so, I think. It is true that some individuals, suffering from active tuberculosis, can work and carry the load of working, while others cannot." (R. 50)

The attention of this court is directed to the testimony of the plaintiff in regard to his physical condition:

"***I was gassed in the Argonne on the 26th

of October, 1918; I inhaled gas and it made me very sick at the time. I also had influenza while in the army, which I contracted after I was taken to the hospital from the Argonne. I was in the base hospital at Nance, France, and as I remember it was a patient there between four and five months. At that time I was under weight, had night sweats which were severe and I run a temperature all the time.***" (R. 14)

"***I was at home from the date of my discharge, about a year at that time, and I was sick all of that time and not able to do anything. I felt weak and didn't have any energy to do anything. My joints bothered me, I had a cough and chest pains, coughed and spit up a lot of sputum all the time.***" (R. 15)

"***I have been advised by examiners in the Veterans' Bureau hospital as to what my condition or disability is, the United States Government gave me a total permanent disability, for pulmonary tuberculosis. There is a way a person can tell when they have that disease, and I don't have any trouble knowing I have it for I cough a lot, spit up bad sputum and blood, sometimes, and I have night sweats all the time and run a temperature in the meantime. I think my condition has altered some since I got out of the hospital and the army; my condition has steadily grown worse all the time since I was discharged from the service. Since my discharge I have not been free from temperatures;

I have not been free from the pain condition in the chest.***" (R. 18-19)

The court's attention is directed to the testimony given by Dr. Duncan L. Alexander:

"***I first examined Mr. McCleary in May, 1920, I found him suffering from a cough, purulent expectoration, temperature continued.***" (R. 34)

"***I further examined the patient on the third day of July; the name here is in the bookkeeper's handwriting, but the notation is mine. The symptoms were fever, continued cough with expectoration purulent, repeated examination of which showed negative for tubercular organisms. There was pain in the chest and difficulty with respiration, that is, with the [37] breathing, during the acute attack. A dullness in one of the lungs developed about the first of June, 1920, and on the second of June aspirated the pleural cavity, without record as to which side, and obtained a clear yellow fluid. *** At that time my diagnosis of his condition, clinically and not from bacteriological findings, was a tubercular infection, which in my judgment was the thing that was prevalent. Asked if I would classify that as active pulmonary tuberculosis, well it was certainly very active.***" (R. 35)

"***I found rales in this man; they were over the apices, in fact they were general over the chest, as I remember it,***" (R. 40)

Josephine McCleary, the wife of plaintiff testified in part as follows:

> "***I think the second week after we were married he was to work, and I noticed that he coughed almost constantly and especially at night, and he was exhausted and he just didn't seem natural or normal to me, he just didn't seem well; it seemed like he would get feverish and irritable. I have been with him part of the time during the past two years and I am living with him now. He has that constant cough now, and brings up a lot of sputum sometimes. I noticed the same symptoms right away after we were married.***" (R. 29)

> "***I also observed the indications of night sweats that he testified to. I observed those first very shortly after we were married, in fact right after we were married.***" (R. 29)

The mother of the plaintiff, Mrs. E. M. McCleary testified in part as follows:

> "***He went away a perfect specimen of young manhood and came back a perfect wreck; he was sick, poor and emaciated, coughing, and could hardly walk.***" (R. 41)

Dr. G. D. Waller testified in part:

> "***I am employed now by the United States Veterans' Administration, at Fort Harrison, Montana.*** I know Harry D. McCleary. I

> made a physical examination of him I think it was in March, 1932. That examination was made in conjunction or consultation with the board of three, of which I am a member. ***Using this report to refresh my memory, we found Mr. McCleary to be suffering from a far advanced active tuberculosis and a chronic pleurisy of both lungs. Asked to what degree of disability with reference to whether it is total or less than total we found existed, my answer is total. Asked what my judgment is as to the prognosis, with reference to its permanency, the chances are that it is permanent. In my judgment I would say that should continue throughout the remainder of his lifetime.***" (R. 42-43)

The only medical testimony at an early date in the record is that of Dr. Alexander. We submit that there is nothing in Dr. Alexander's testimony to indicate that McCleary at that time was suffering from incipient tuberculosis. It is true that the doctor was very conservative and did not give a prognosis, nor did he estimate how long he considered McCleary had suffered from active tuberculosis, but he did say "I found rales on this man; they were over the apices, in fact they were general over the chest, as I remember it." (R. 40)

All of the evidence in the record in this case considered together, we submit, is such that the minds

of reasonable men might well differ as to the effec' of such evidence, and it should require the submission of this case to the jury.

> "Where uncertainty as to the existence of negligence arising from a conflict in the testimony, or because, the facts being undisputed, fairminded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. Citing cases." Gunning v. Cooley, 281 U. S. 90; 50 S. Ct. 231, 74 L. Ed. 720.

II.

THE COURT MISCONSTRUED THE DECISIONS OF THE TENTH CIRCUIT COURT OF APPEALS AS IS SHOWN BY THE LATEST DECISION OF THE TENTH CIRCUIT COURT IN THE CASE OF UNITED STATES v. THOMAS.

This case was decided by this court upon authority of the decision of the Falbo case and consequently the rule in that case, as laid down by this court, is all that counsel has upon which to base this petition for rehearing, although the facts in that case are not the same as in the instant case. In the Falbo case this court follows and adopts the decision of the Tenth Circuit Court in United States v. Rent-

frow, 60 Fed. (2d) 488. The case of United States v. Rentfrow is clearly distinguishable from this case, for the reason that the Rentfrow case was not one in which a trial judge had directed a verdict, but was a case that had been tried by the court without a jury, and in the Rentfrow case Dr. Calhoun testified that he served with the insured during the war. That the claimant was not sick except with a cold and the flu, although he had a cough which the doctor attributed to cigarettes. The doctor did not see the plaintiff until 1922 and diagnosed the case as tuberculosis. That he advised the insured to go to a hospital, and "he testified that, if the insured had gone to a hospital or sanitarium at that time, he would probably have become an arrested case; that he did not believe that at that time insured's condition was permanent, if he followed the treatment prescribed." This was the only medical testimony in the Rentfrow case and Judge McDermott specifically stated:

> "There is no evidence, however, of the permanence of the disability. The only direct evidence on the subject is that of Dr. Calhoun who testified that in 1922 his condition was not a permanent one, and that the disease would probably have been arrested if the insured had followed the treatment prescribed."

And the court stated:

> "It is a matter of common knowledge, as this court took occasion to say in Nicolay v. United States, supra, that many incipient tuberculars respond readily to the simple treatment of rest and nourishment, and are thereafter able to follow many gainful occupations."

The only medical testimony in the Rentfrow case then was to the effect that Rentfrow was not permanently disabled; that he had reached a condition of arrest; that he had incipient tuberculosis at the most while the policy was in force.

In this case there is no evidence that McCleary ever became arrested after he contracted tuberculosis, as the evidence of plaintiff, if believed, clearly shows the examination reports introduced by defendant were merely perfunctory and were not reports of physical examinations. The evidence of temperature, night sweats, cough, general weakness, and the other symptoms testified to, would clearly indicate a continued activity, from the time McCleary was discharged from the army, of his tuberculosis condition, and also shows that his condition was far past the incipient stage before his policy lapsed, or would have lapsed, and that a jury would have been warranted in finding his tuberculosis had reached an advanced stage before his policy lapsed.

The real holding of Judge McDermott in the Rentfrow case is made all the more clear by his decision in the case of United States v. Thomas (CCA 10), decided March 28, 1933, not yet reported, and Judge McDermott in that case stated in part as follows:

> "Doctor Colton diagnosed his case in July, 1919, as arthritis and chronic throat condition; in 1922 there was a definite chest pathology—a retraction of the apices with diminished resonance or percussion, changed breath sounds, and other evidences which convinced the physician he was affliced with tuberculosis which bordered between moderately and far advanced, and that he was probably afflicted with the disease in 1919."

And further along in the opinion Judge McDermott says:

> "Counsel for appellees have brought to our attention valuable excerpts from the Report on Tuberculosis made in 1932 by Dr. Arthur Salusbury MacNalty, Senior Medical officer for Tuberculosis of the Ministry of Health of London; and from the recent work of Dr. Maurice Fishberg, Chief of the Tuberculosis Service, Montefiore Hospital, on Pulmonary Tuberculosis. From these, it appears that the effect of tubercle bacilli varies widely with the individual infected therewith, and that it is impossible to make a definite prognosis at the outset of the disease. It follows,

therefore, that while we are concerned only with the condition of the insured when his policy lapsed, subsequent events are of vital import in determining his then condition."

And further Judge McDermott says:

"Taking into view the entire history of the insured in this case, we find much more than the ordinary case of minimal or incipient tuberculosis. We find a man whose entire system had been shattered, and his resistance lowered, by months of unremitting exposure to the elements in a forbidding climate; we know now that the disease had, in all probability, passed the minimal stage, even then." United States v. Thomas (CCA 10), decided March 28, 1933.

In the Thomas case it appeared that the veteran had taught school for about four years, did some work for a building and loan association, took some vocational training and worked for a while as time keeper in a mine.

III.

THE COURT DID NOT GIVE PROPER WEIGHT TO THE FACT THAT TUBERCULOSIS IS STILL A DREADFUL AND KILLING DISEASE.

The court, in its opinion in the Falbo case seems to have fallen into the error recently apparent in the

opinions of the Eighth and Tenth Circuit Courts, and assume judicial notice of a fact, to-wit: that tuberculosis is curable, which fact is denied by authorities dealing with this disease.

Dr. Arthur Salusbury MacNalty, Senior Medical Officer for Tuberculosis Ministry of Health, London, stated the following, in his 1932 report:

> "Tuberculosis is still a killing and tragic disease, the 'Captain of the Men of Death' as Bunyan called it." MacNalty Report on Tuberculosis for 1932, Page 2.

In his report on page 87, MacNalty gives statistics, showing that 33 per cent of the deaths occurring in England, among the male population, between the ages of 15 and 35, during the year 1929, were the result of tuberculosis. In the same year, figures show that in England, out of 35,550 persons admitted for sanitorium treatment, only 18 per cent were discharged in a quiescent condition; that of these admissions, 13,637 were admitted without a positive sputum, and of those only 37 per cent were discharged in a quiescent condition. And speaking of sanitorium treatment, he says:

> "Although sanitorium treatment may secure quiescence of the disease, in a reasonable proportion of cases a definite tendency to relapse

> remains. It is, therefore, necessary in attempting to assess the true value of sanitorium treatment, to study the after-histories of patients." MacNalty, a Report on Tuberculosis, 1932, Page 90.

And in the United States in 1929 we find that 13,722 deaths among the male population, between the ages of 20 and 35, were due to tuberculosis, while only 13,348 deaths were attributable to heart disease, cancer, nephritis and cerebral hemorrhage and pneumonia combined, which were the other leading causes of death in the United States that year, excluding accidents. Mortality Statistics, 1929, pages 196-219, U. S. Dept. of Commerce.

Referring to the possibility of an arrest of the plaintiff's tubercular condition, it would seem extremely problematical that such an arrest, could one have been effected, would have been permanent.

Dr. Maurice Fishberg, Chief of the Tuberculosis Service, Montefiore Hospital, and its country sanitorium for incipient tuberculosis, an internationally recognized authority, states in his work on tuberculosis, speaking of arrested cases:

> "If the improvement had been attained through careful treatment in a favorable environment, the test is whether the patient remains in good condition for some time after returning to his

old environment without suffering a relapse of the constitutional symptoms. The test, in other words, is duration; improvement counts if it last without special treatment." Fishberg, Pulmonary Tuberculosis, 1932 Edition, Volume II, Page 247.

And he further states:

"Indeed, I have been struck with the fact that when a patient who recovered from phthisis (tuberculosis) is unable to pursue the vocation for which he has been trained for many years, he will not be well, even if he remains idle indefinitely." Fishberg, Pulmonary Tuberculosis, 1932 Edition, Volume II, Page 308.

And further:

"On the whole, it appears that cured patients do best when returning to their old vocations for which they have been trained, and at which they can earn most with the least possible effort. It may be said that, with some striking exceptions, if a patient is not able to pursue his former line of work he is altogether disabled." Fishberg, Pulmonary Tuberculosis, 1932 Edition, Volume II, Page 309.

As applied to this case, these authoritative quotations of Dr. Fishberg mean, that assuming the existence of the possibility to cure the plaintiff in 1919, that nevertheless, that cure would not have been permanent. As it is highly improbable, that even

assuming a cure, this plaintiff could have returned to his former vocation (labor). And paraphrasing the Doctor's statement, we might say *that if the plaintiff is not able to pursue his former line of work, he is altogether disabled.*

The error in assuming even that incipient tuberculosis is curable, is clearly apparent from the following quotation:

> "*The notation that this disease is curable in its incipient state is one of the medical half-truths which have gained universal credence because of tradition. There are so many exceptions as to almost nullify this ancient dictum.* We have already shown that it is fallacious to classify phthisis into three or four stages, and to say, without reservation, that in the first stage it is curable; in the second stage the chances of recovery are considerably diminished, while in the third stage it is incurable.
>
> "*There are 'incipient' cases detected as early as is humanly possible which have no chance, irrespective of the treatment applied;* while there are many in the third stage whose chances of survival and even of efficiency are excellent." Fishberg, Pulmonary Tuberculosis, 1932 Edition, Volume II, Pages 232-233.

It may be that in assuming judicial knowledge of the curability of tuberculosis, the court has been misled by the knowledge that ninety-five per cent of

us have some tuberculosis activity at some time during our lives, as we are told by specialists in this disease. However, the question is not whether or not we have tuberculosis, it is a question of whether or not the tubercle bacilli makes the individual sick. And if it does, he has the disease of tuberculosis and not the so-called "incipient tuberculen."

Dr. Fishberg states:

> "It must, however, be mentioned here, *** that in human beings infection alone is not sufficient to produce disease; after all, disease occurs only in a comparatively small proportion of persons infected with tubercle bacilli. In other words, while there is no tuberculosis without tubercle bacilli, these micro-organisms harm only those who are predisposed to the disease. We are more and more becoming convinced that phthisiogenisis is more a problem of predisposition than of bacterial infection." Fishberg, Pulmonary Tuberculosis, 1932 Edition, Volume I, Page 112.

Referring again to Dr. Fishberg, we find figures to show that of over 1,900 insured tuberculars that were treated in sanitoriums in the year 1914, that within six years, or in 1920, 76.5 per cent were dead, and of the remaining 23.5 per cent, half were unable to work. Fishberg, Pulmonary Tuberculosis, 1932 Edition, Volume II, Page 354.

As applied to this case, we find that the symptoms which were present in and exhibited by the plaintiff, Harry D. McCleary, and to which he testified, and to which his mother, Mrs. E. M. McCleary testified, before his policy would have lapsed, were evidence of the existence of the disease, rather than mere infection, which disease was then disabling in character and deadly in consequence.

Referring to the case of Rentfrow v. United States, and the cases following that case, relied upon by this court in its opinion, attention is directed to the fact that the Tenth Circuit has now realized their mistake, and the injustice of their assumption of the curability of tuberculosis, and have limited, if they have not overruled the doctrine laid down in those cases.

In the case of the United States v. Thomas, wherein the plaintiff's intestate worked for a period of four years teaching school, worked some for a building and loan association, took vocational training and worked as a timekeeper in a mine, and where the first finding of any definite chest pathology was in 1922.

Judge McDermott, the author of the opinion in the case of the United States v. Rentfrow, said:

> "It has been held by this and other court that the plaintiff must establish, by substantial

The court in its opinion has quoted from the case of United States v. McCreary (CCA 9), 61 Fed. (2d) 804, to the effect that the plaintiff must show that his disability was "reasonably certain to be permanent during lifetime." Such statement seems ill advised and casts the burden upon the plaintiff of proving that he was suffering from disability which will be unending, will last forever; and then proving that this unending is reasonably certain to continue throughout his lifetime. It is not necessary to prove that the disability is permanent in that sense of the word. It is necessary only to show that the disability is reasonably likely to continue throughout the lifetime of the insured. The act itself recognized that this is only a reasonable likelihood and provides for the contingency of a recovery. Consequently the word "permanent" has no legitimate place in these cases if it is to be construed as unending. This court has heretofore recognized this fact as follows:

> "The appellant further contends that ultimate cure is reasonably certain, but this is problematic, to say the least. The probabilities would seem to be the other way. But in any event the policy itself provides for such a contingency because the insured may be called upon at any time to furnish proof satisfactory to the Director of the United States Veterans Bureau of the continuance of his total permanent disability

> and if he fails to furnish such proof, all payments of monthly installments on account of total permanent disability shall cease and all premiums thereafter falling due shall be payable in conformity with the policy." U. S. v. Ranes (CCA 9), 48 Fed. (2d) 582.

Consequently, the court cannot say as a matter of law that the possibility that a cure might be effected can overcome the existing fact that the disability has been permanent, as that term may be defined, over a period of nearly fourteen years.

V.

THE COURT DID NOT GIVE PROPER EVIDENTIARY VALUE TO THE FACT THAT PERMANENCE MAY BE SHOWN BY CONTINUATION OF FACT — IN THIS CASE TOTAL DISABILITY.

We submit that the record is uncontradicted that plaintiff was totally disabled at the time his policy lapsed, or would have lapsed. In the opinion in the Falbo case, this Court stated:

> "The one substantial question is whether or not the court erred in directing the verdict for want of any substantial evidence that the plaintiff was *permanently* disabled in May, 1919, when the policy would otherwise have lapsed."

In this case, total permanent disability was conclusively proved in May, 1922, and that total and permanent disability was a continuation of the theretofore existing total disability. It would seem anomalous to say that a disease which is now total and permanent has not been permanent during all the time of its existence.

It is a well known fact that in making a prognosis of a disease, its response to treatment is a material factor and that, particularly in cases of tuberculosis, two men might be afflicted at the same time and in the course of five years, one of them would become an arrested case and the other would continue an active condition, after which length of time it could be determined that the latter was a permanent condition and the former was not, a fact which obviously would have been unknown at the commencement of the disease in either case. Consequently, we cannot say that in the latter of the two illustrations the man was not permanently disabled from the inception of the disease.

It has recently been held by this court that evidence which is contradicted by physical fact cannot be made the basis of a verdict.

> "The physical facts positively contradicting the statement of a witness control, *and the court*

> *may not disregard them.* (Citing cases.) Judgements should not stand upon evidence that cannot be true." U. S. v. Kerr (CCA 9), 61 Fed. (2d) 800, 803; See also U. S. v. McCreary (CCA 9), 61 Fed. (2d) 804.

The same situation prevails in this case, to-wit, the existence of total disability over a long period of years is a physical fact that must overcome testimony indicating the possibility that the total disability would not continue.

And it has been held in numerous cases that evidence may be sufficient to take a case of this type to the jury where no medical testimony concerning a prognosis is in the record.

U. S. v. Tyrakowski (CCA 7), 50 Fed. (2d) 766; Carter v. U. S. (CCA 4), 49 Fed. (2d) 221; Madray v. U. S. (CCA 4), 55 Fed. (2d) 552; Malavski v. U. S. (CCA 7), 43 Fed. (2d) 974; Kelly v. U. S. (CCA 1), 49 Fed. (2d) 897; Glazow v. U. S. (CCA 2), 50 Fed. (2d) 178.

Likewise this court has held in the case of Mulivrana v. U. S. (CCA 9), 41 Fed. (2d) 734, the evidence was sufficient to take the case to the jury where the earliest testimony concerning the veteran's condition was in 1921, a year and a half after the policy of insurance lapsed.

That the opinion of medical experts is not conclusive as against an existence of fact, has been declared by the Tenth Circuit as follows:

> "However this may be, the jury might well have been inclined to take the positive evidence of the plaintiff to the opinion of the medical men which he called in his behalf. Medical men indulge very generally in theorizing on the affairs of life, while the living of life is a very practical affair." Barksdale v. U. S. (CCA 10), 46 Fed. (2d) 762.

In the present case, the jury might well have found that the positive fact of the continuation of total disability merging into an admittedly permanent disability overweighed any evidence that there may have been a possibility of cure.

> "As permanence of any condition (here total disability) involved the element of time, the event of its continuance during the passage of time is competent and cogent evidence." McGovern v. U. S. (DC), 294 Fed. 108.

It is submitted that the fact to be proved in this case, that is permanence, is susceptible of proof by other evidence than the opinion of experts, as has been recognized by the cases cited herein, and that such fact in this case has been proved by the physical fact of its existence over a long period of years.

"The common sense, and, we may add, the natural instincts of mankind, reject the supposition that only experts can approximate certainty upon such a subject." Connecticut Mutual Life Ins. Co. v. Lathrop, 111 U. S. 612, 28 L. Ed. 536.

VI.

THE COURT INVADED THE PROVINCE OF THE JURY AND WEIGHED THE EVIDENCE.

This court, we submit, weighed the evidence in this case, and to substantiate its finding disbelieved the testimony of the witnesses heretofore quoted.

The 7th Amendment of the Constitution provided for a trial by jury, and the jury is the sole judge of fact. It devolves upon them, and upon them alone, to determine the truth or falsity of any complicated testimony, as well as to weigh all the testimony to determine its convincing force.

The federal courts have been called upon frequently to determine their power to take cases from the jury and direct verdicts for one party or the other.

Parsons v. Bedford, 3 Pet. 433, 7 L. Ed. 732; Barney v. Schmeider, 9 Wall. 248, 19 L. Ed. 648; Walker v. New Mexico R. Co., 165 U. S. 593, 17

S. Ct. 421, 41 L. Ed. 837; Capital Traction Co. v. Hof, 174 U. S. 1, 19 S. Ct. 580, 43 L. Ed. 873; Slocum v. N. Y. Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879; Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720.

To quote Justice Storey:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated in and secured in every state constitution in the Union * * *. One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people." Parsons v. Bedford, 3 Pet. 433, 7 L. Ed. 732.

CONCLUSION

In conclusion, it is respectfully submitted that upon the foregoing grounds this Petition for Rehearing

should be granted and a reconsideration of the record herein should be had.

SMITH, MAHAN & SMITH
HOWARD TOOLE
W. E. MOORE
Attorneys for Petitioner

CERTIFICATE OF COUNSEL

I, John W. Mahan, do hereby certify that I am one of the counsel for the appellant in the above entitled cause; that I have carefully read over and considered the above and foregoing Petition for Rehearing in the above entitled cause, and that in my judgment it is well founded and that it is not interposed for delay.

Dated this 13th day of June, 1933.

JOHN W. MAHAN

Residence and Office Address:
Court House Building,
Helena, Montana

No. 7103

United States
Circuit Court of Appeals
For the Ninth Circuit

BELRIDGE OIL COMPANY, a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Upon Petition to Review an Order of the United States Board of Tax Appeals.

PERNAU-WALSH PRINTING CO., 755 MARKET ST., SAN FRANCISCO

No. 7103

United States
Circuit Court of Appeals
For the Ninth Circuit

BELRIDGE OIL COMPANY, a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
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Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES.

CLAUDE I. PARKER, Esq.,
JOHN B. MILLIKEN, Esq.,
For Taxpayer.

R. W. WILSON, Esq.,
For Commissioner.

DOCKET ENTRIES.

Transferred to Mr. Morris 10/31/31

1927

Sep. 14—Petition received and filed. Taxpayer notified. (Fee paid.)

Sep. 15—Copy of petition served on General Counsel.

Nov. 14—Answer filed by General Counsel.

Nov. 16—Copy of answer served on taxpayer. Circuit Calendar.

1930

Jan. 16—Notice of appearance of John B. Milliken as counsel for taxpayer filed.

Mar. 19—Hearing set May 22, 1930, Los Angeles, California.

May 22—Hearing had before Mr. McMahon—called on merits—briefs due 8/15/30—reply brief in 15 days.

July 9—Transcript of hearing 5/22/30 filed.

July 29—Motion for extension to 9/15/30 to file brief and October 1, 1930, to file reply brief filed by taxpayer. 7/30/30 granted.

1930

Aug. 4—Brief filed by General Counsel.

Sep. 15—Brief filed by taxpayer. 9/20/30 copy served.

Sep. 26—Reply brief filed by taxpayer.

1932

Aug. 16—Findings of fact and opinion rendered, Mr. Morris, Div. 14. Judgment will be entered for Commissioner.

Aug. 17—Decision entered, Mr. Black, Div. 15.

Nov. 15—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

Nov. 15—Proof of service filed.

Dec. 19—Agreed statement of evidence lodged.

Dec. 19—Præcipe filed—proof of service thereon.

Dec. 20—Agreed statement of evidence approved and ordered filed.

1933

Jan. 13—Order enlarging time to 3/1/33 for transmission and delivery of record entered.

Feb. 24—Order enlarging time to March 15, 1933, for transmission and delivery of record entered. [1]*

*Page numbering appearing at the foot of page of original certified Transcript of Record.

United States Board of Tax Appeals.

Docket No. 31,218

BELRIDGE OIL COMPANY,
1106 Bank of Italy Building,
Los Angeles, California,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.,

Respondent.

PETITION.

The above-named taxpayer hereby appeals from the determination by the Commissioner of Internal Revenue set forth in his deficiency letter (IT:CA: 2113-9-60D), dated July 18, 1927, and as the basis for its appeal sets forth the following:

1. Taxpayer is a domestic corporation of the State of California, under the laws of which state it was organized in January, 1911, and has its principal place of business at 1106 Bank of Italy Building in the City of Los Angeles.

2. The deficiency letter, copy of which is attached hereto, was mailed to taxpayer on or about July 18, 1927, and states a deficiency in tax for the years 1921 to 1923, inclusive, in the respective sums of $45,293.85, $4,692.89 and $4,684.91, a total deficiency for the three years of $54,671.65.

3. The taxes in controversy are income and profits taxes for the years 1921 to 1923, inclusive, and are more than $10,000.00, to wit: $54,671.65. [2]

4. The determination of the deficiency as stated in the Commissioner's letter above referred to is based upon the following errors:

(a) The Commissioner erred in eliminating from invested capital of the corporation for the year 1921 the sum of $974,995.00, the same being the excess of the par value of the stock, $999,995.00, specifically issued in January, 1911, for an option to purchase over the $25,000.00 which certain individuals had previously paid for such option, which option enabled the corporation to purchase over 30,000 acres of prospective oil land at an average price of approximately $33.00 per acre, a price insignificant when compared with the actual value at that time of probable oil land. In other words, the Commissioner erred in not permitting this option (tangible property) to be included in invested capital in an amount not less than the par value of the capital stock specifically issued for it, the actual cash value of the asset at that time being not less than the par value of the stock so issued.

5. The facts upon which petitioner relies as the basis for its appeal are as follows:

(a) For several years prior to 1911 the oil industry in California had made wonderful strides due to the discovery of new oil-bearing sands. Messrs. Burton E. Green and M. H. Whittier early became interested in this industry and during the years 1909 and 1910 gave no little of their time and attention to the seeking out with a view to acquiring, either by lease or purchase, prospective

oil lands with sufficient acreage to be worth while in the event they proved productive of oil in commercial quantities. Scouts were employed to carefully inspect and view lands either adjacent to, or remote from, fields then [3] proven. Among others employed in this scouting service and representing Messrs. Green and Whittier and their associates was a Mr. Van Slyke, a practical oil man having by reason of his experience, general knowledge of the geological formation of California and the structures from which oil was most likely to be produced. His investigations led him into Kern County, California, in certain portions of which oil had heretofore been discovered and was being produced in substantial quantities. Lands adjacent to the then producing fields were unavailable to Messrs. Green and Whittier and their associates, for the reason that they had been previously acquired by interests which had made prior discoveries. It was left to them, therefore, to spy out other lands somewhat remote from the producing fields having practically the same topography and geological structure. On one of his scouting trips Mr. Van Slyke more or less accidentally came to a point from which petroleum was seeping. A study of the geological structure, in so far as that was possible from the surface outcropping, and a comparison of the structure and formation with that of producing territory some distance away, with a complete examination of the outcropping, convinced Mr. Van Slyke that the seepage marked the center of what was highly probable, almost certain oil producing territory. This

discovery was reported to Messrs. Green and Whittier, who made an investigation and were also convinced that the territory surrounding the point of seepage was underlain with rich oil-bearing sands. So thoroughly convinced were they of the richness of the find that for themselves and their associates they were willing to pay a substantial sum of money looking to the purchase of the land. Not desiring at that time to be personally known in the negotiations, they took steps through a [4] third party, Mr. W. J. Hole, to secure from the owner, Mrs. Emily J. Hopkins, an option to purchase, not only a section or small parcel of land immediately surrounding the point of seepage, but a tract of more than 30,000 acres, all of which was from their viewpoint highly prospective and probable oil territory.

As a result of the negotiations which Mr. Hole carried on, Mrs. Hopkins, to whom information in respect of the seepage discovery had not been communicated, on January 5, 1911, for a consideration of $25,000.00 in cash to her paid, entered into an agreement whereby she granted to Messrs. Green, Whittier and their associates an option to purchase 30,845.96 acres of land for a price of $33.33-1/3 per acre, a total agreed purchase price under the option for the entire tract of $1,028,198.60, payable in certain specified installments spread over the next succeeding two years.

Convinced of the great value of this property and in order to be in a better position to finance and operate the same, the promoters organized the

Belridge Oil Company, which company was incorporated under the laws of the State of California on January 25, 1911, with an authorized capital stock of $1,000,000.00—that is, 1,000,000 shares at a par value of $1.00 per share, all of which, except five shares issued to the incorporators for cash, was issued to the incorporators for the aforesaid option.

In pursuance of the plan of organization this option, with all the benefits and advantages which it carried, was assigned or transferred to the corporation in exchange for 999,995 shares, of the par value of $1.00 each, of the capital stock of the company. The land thus acquired under the option, being highly probable oil land, [5] had a then actual cash value of at least $2,056,397.20—that is, a value equal to at least twice the price at which, under the option, it could be purchased. By reason of having secured the option, the corporation was in a position to buy and did buy the entire tract of land for $1,028,198.60. The option then had an actual cash value to the corporation at the time it was acquired of not less than $1,028,198.60 and, being tangible property, is properly includable in invested capital in an amount not less than the par value, viz.: $999,995.00 of the capital stock specifically issued for it.

6. The petitioner prays for relief from the deficiency asserted by the respondent on the following and each of the following particulars:

(a) That it be allowed to include in invested capital for the year 1921 the amount of $974,995.00, being the excess of the par value of the stock $999,-995.00 specifically issued in January, 1911, for the option to purchase, over the $25,000.00 cash which certain individuals had previously paid for such option.

WHEREFORE, petitioner prays that this Board may hear and redetermine the deficiency herein alleged.

H. L. WESTBROOK,
Treasurer Belridge Oil Co.

State of California,
County of Los Angeles.—ss.

H. L. Westbrook, being duly sworn, says: That he is the Treasurer of the Belridge Oil Company above named, and as such is duly authorized to verify the foregoing petition. That he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be on information and belief [6] and those facts he believes to be true.

H. L. WESTBROOK.

Subscribed and sworn to before me this 9th day of September, 1927.

[Seal] MARGUERITE LE SAGE,
Notary Public in and for the County of Los Angeles, State of California. [7]

Treasury Department,
Washington.

July 18, 1927.

Office of
Commissioner of Internal Revenue.
IT:CA:2113-9-60D
Belridge Oil Company,
1106 Bank of Italy Building,
Los Angeles, California.
Sirs:

The determination of your income tax liability for the years 1921 to 1923, inclusive, pursuant to an examination of your books of accounts and records, disclosed a deficiency in tax amounting to $54,671.65, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on

such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:CA:2113-9-60D.

In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully,

D. H. BLAIR,
Commissioner.
By C. R. NASH,
Assistant to the Commissioner.

Inclosures:
Statement
Form A
Form 882 [8]

STATEMENT.

IT:CA:2113-9-60D

In re: Belridge Oil Company,
1106 Bank of Italy Building,
Los Angeles, California.

Year	Deficiency in Tax
1921	$ 45,293.85
1922	4,692.89
1923	4,684.91
Total	$ 54,671.65

1921

Net income reported	$ 437,878.28
Add:	
Donations	700.00
Excessive depreciation	638.00
Income from salvage of well 393	495.00
Excessive loss claimed on wells	25,113.35
Total corrected net income	$ 464,824.63

Invested Capital

Capital stock as at January 1, 1921	$1,000,000.00
Surplus	637,056.29
Surplus reserve appreciation earned	1,279,400.91
Overpayment 1918 tax	6,127.99
Overpayment 1919 tax	1,190.81
Total	$2,923,776.00

Deduct:	
Prior year's income tax prorated from dates of payment	$107,615.47
Additional tax 1917	751.69
Stock discount	974,995.00
Dividend paid 1/22/21 prorated	47,123.29
Dividend paid 2/23/21 prorated	42,739.73
Dividends paid after 60 days in excess of earnings less accrued taxes:	
Dividend paid 3/25/21 prorated	118,882.79
Dividend paid 4/21/21 prorated	13,085.12
Dividend paid 5/21/21 prorated	9,403.89

[9]

Forwarded		$2,923,776.00
Dividend paid June 21, 1921, prorated	$ 7,492.61	
Dividend paid July 31, 1921, prorated	6,854.39	
Dividend paid August 22, 1921, prorated	4,651.87	1,333,595.91
Balance		$1,590,180.09
Inadmissibles .0005%		795.09
Invested capital		$1,589,385.00
Excess profits credit		130,150.80
Excess profits tax		96,324.29
Income tax		36,850.03
Total tax liability		$ 133,174.32
Total tax assessed		87,880.47
Deficiency		$ 45,293.85

1922

Net income reported	$ 356,281.03
Add:	
Excessive depreciation	37,543.10
Net income corrected	$ 393,824.13
Tax liability at 12½%	49,228.02
Tax assessed	44,535.13
Deficiency	$ 4,692.89

1923

Net income reported		$ 135,099.02
Add:		
Excessive depreciation		39,316.35
Total		$ 174,415.37
Deduct:		
Loss on Well 371	$1,832.74	
Interest on income tax	4.34	1,837.08
Net income corrected		$ 172,578.29
		[10]
Tax liability at 12½%		$ 21,572.29
Tax assessed		16,887.38
Deficiency		$ 4,684.91

The adjustment on account of excessive depreciation as made by the Revenue Agent in his report dated November 19, 1926, a copy of which has been furnished you, has been approved by this office.

The excessive loss on wells has been disallowed for the reason this has been ruled allowable in prior years and has been so allowed by this office. The loss allowed for this year is on well #22-#365, as shown by the agent's report.

Donations have been disallowed in accordance with Article 562, Regulations 62. Since the entire loss on well #393 was allowed as a deduction in prior years, any amounts recovered on account of salvage constitutes income in the year received.

The adjustment to invested capital on account of dividends is in accordance with Article 857, Regulations 62.

Federal income taxes have been adjusted from the date they became due and payable.

The stock discount has been excluded from invested capital for the same reason as shown in office letter dated May 17, 1924, a copy of which has previously been furnished you.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district and remittance should then be made to him.

[Endorsed]: Filed September 14, 1927. [11]

[Title of Court and Cause.]

ANSWER.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above named taxpayer, admits and denies as follows:

1. Admits the allegations in paragraph 1 of the petition.

2. Admits the allegations in paragraph 2 of the petition.

3. Admits the allegations in paragraph 3 of the petition.

5. Denies the allegations in paragraph 5 of the petition.

Denies generally and specifically each and every allegation in taxpayer's petition not hereinbefore admitted, qualified, or denied.

C. M. CHAREST,
General Counsel,
Attorney for Commissioner of Internal Revenue.

JOHN D. FOLEY,
Special Attorney,
Bureau of Internal Revenue,
Of Counsel.

[Endorsed]: Filed November 14, 1927. [12]

[Title of Court and Cause.]

Promulgated August 16, 1932.

"Actual Cash Value" of an option, paid in for capital stock, determined for invested capital purposes.

JOHN B. MILLIKEN, Esq., for the petitioner.

R. W. WILSON, Esq., for the respondent.

This proceeding is for the redetermination of a deficiency in income and excess profits taxes of $45,293.85 for the year 1921 and deficiencies in income tax of $4,692.89 and $4,684.91 for the years 1922 and 1923, respectively.

The issues presented by the pleadings and by amendment thereto at the hearing are (1) whether

the respondent erred in eliminating $974,995 from invested capital of the corporation for 1921, being the excess of the par value of the stock, $999,995, issued in January, 1911, for an option to purchase, over ran amount of $25,000 which certain individuals had previously paid for said option, which option enabled it to purchase over 30,000 acres of prospective oil land at an average price of approximately $33 per acre. Or, stated differently, he erred [13] in failing to permit this option (tangible property) to be included in invested capital in an amount not less than the par value of the capital stock issued for it, the actual cash value of the asset at that time being not less than the par value of the stock so issued; and (2) that he erred in his refusal or failure to allow petitioner a paid-in surplus in accordance with Section 326 of the Revenue Act of 1921 in that the asset, i. e., the option, paid in for stock, had an actual cash value at the time paid in clearly and substantially in excess of the par value of said stock in the amount of $671,806.40.

FINDINGS OF FACT.

The petitioner is a corporation, organized and incorporated under the laws of the State of California on January 25, 1911, and has its principal place of business in Los Angeles, California.

In 1910 and 1911 one W. J. Hole was engaged in the capacity of resident sales agent, in Los Angeles, for the Stearns Rancho Company, which, in the beginning, owned, and was engaged in the

sale of approximately 300,000 acres of land in southern California. That company was composed of Edward and Emily B. Hopkins of New York, the latter owning a 55 per cent interest therein, and its principal office was located in San Francisco. Mrs. Hopkins, now deceased, who was about 55 years of age at the time, was represented in California by C. A. Grove, the said Stearns Rancho Company, and finally by one William Hill. She left the management of her lands to her agents. [14]

Hole also purchased and sold relatively large tracts of property from time to time on his own account, such purchases being accomplished by means of down payments, or, as was his usual practice in 1910 and 1911, through the medium of options for stated periods of time.

The said Emily Hopkins also owned 30,845.96 acres of land, in an unbroken parcel, situated in Townships 27 and 28 South, Ranges 20 and 21 East, Kern County, California, between McKittrick and Lost Hills, with which said Hole had been familiar for six or eight years prior to 1910. Hole, who had been very successful as agent for the Stearns Rancho Company, had been promised by a representative of Mrs. Hopkins that if this tract of land should be offered for sale, he, Hole, would be given first consideration in its purchase. Hole, having been informed that others were seeking an option to purchase said land and having been advised to act promptly in the premises if he cared to secure such an option, procured in 1910 a written

option from the owner for a period of one year for a nominal sum of $1 "and other valuable considerations," to purchase the said tract of 30,845.96 acres for $20 an acre. Hole was induced to acquire the said option because he then considered the land to be splendid for agricultural purposes and he also thought there were good prospects for oil on some of the land, inasmuch as there were oil fields on both sides; however, of this he had no tangible proof.

One William Van Slyke, who had been engaged in the oil business as a driller's helper, a driller, and as a superintendent of drillers, and in prospecting for others on his own account since 1894, was [15] acquainted with the acreage here in question in 1910. In that year he first entered upon the property for the purpose of locating boundary stakes and noticed that there was oil structure and he also found oil sands. He returned to the properties again in the same year for the purpose of prospecting for oil signs on the surface and he dug a surface trench and extracted samples of the underlying formation which he tested with chloroform and afterwards had others perform tests of such samples for him. On the various trips that he made between June and December of 1910 he dug a 14-foot hole and discovered what is commonly called black oil sand. He found that the overlying formation was of white chalk-like substance and lower down it was shale and dried out oil sand. He also found live oil sands. As the hole was deepened

the same became richer—it was very black. The odor of oil could be detected in the sands. Van Slyke then covered the hole with planks and dirt and brush so that his discovery might not be detected and he endeavored to acquire some of the land. For oil purposes this tract of land was virgin territory on January 5, 1911, other than as disclosed by Van Slyke's discovery.

After his discovery Van Slyke told Max Whittier, now deceased, about the outcroppings and the live oil sands he had found and about the shaft he had dug. Whittier, among other things, advised him to observe strict secrecy and that he, Whittier, would attempt to acquire some of the land. Whittier also visited the property with him at some time in or about December, 1910. [16]

Hole, having secured said option, endeavored to interest others in the project, but was unsuccessful until he finally interviewed Whittier, who was a recognized expert in oil matters. Whittier was reluctant at first, but, upon being informed of the location of the tract, of the fact that there were nearly 31,000 acres involved and that he, Hole, controlled the purchase of the land, he announced that he would go into the project.

Whittier, at some time thereafter, called upon Burton E. Green, an oil operator of wide experience since 1895, who had already heard of this tract of land, and told Green of his interview with Hole and of Hole's option interest in the property. He also told him of Van Slyke's discovery and

that he would like to interest him in the project. Green, in company with Van Slyke and Whittier, visited the property at some time prior to January, 1911, and saw the oil croppings reported by Van Slyke and the trench that had been dug. He also noted the similarity of the oil croppings there to those in the Lost Hills fields in the northeast. They were very careful not to divulge their discovery to anyone, except M. J. Connell and Frank Buck, who were invited to and did become original stockholders in the corporation when it was organized as hereinafter set forth.

Whittier accompanied Hole to Green's office and after discussion of the number of acres involved and of Hole's option, Hole offered to dispose of the property to them for $33-1/3 an acre, he to retain, however, one-fifth interest in the company to be later formed. Van Slyke's [17] discovery had not been disclosed to Hole, in fact it was not made known until some time after the corporation was organized. Nor had the fact that Hole's option provided for the purchase of the property at $20 an acre been made known until after the transaction was consummated. Green told Hole that if the option could be properly revamped to suit their requirements he would go into the matter and take it over.

Negotiations were then instituted by Green personally toward arranging a suitable option, which was finally consummated after about three or four months' delay and considerable difficulty, neces-

sitating the employment of others and finally entailing the expenditure of $125,000 to a nephew of Mrs. Hopkins, one Benedict, and $35,000 cash and one-fourth of Hole's stock in the company to William Hill, agent of Mrs. Hopkins. What particularly concerned Green was the insertion of a clause therein whereby at least two wells, and as many more as they elected to drill, might be drilled within a year before being required to exercise the option.

Under date of January 5, 1911, Emily B. Hopkins, as the first party, and W. J. Hole, as the second party, entered into an agreement, the recited consideration therefor being their mutual covenants and the nominal sum of $1, providing for the payment by Hole of $25,000 "for the [18] right or option to purchase" the land described therein with particularity, which said sum was actually advanced and paid by Green pursuant to agreement, "subject to pipe line, telegraph and telephone rights to Producers Transportation Company, and Associated Pipe Line Company, and a lease to Miller and Lux for one year from January 1, 1911, for grazing purposes and all such rights of way for pipe lines, telephone and telegraph lines or other rights as may have been heretofore granted or conveyed by said party of the first part." In the event of the exercise of the option before the expiration of one year from January 1, 1911, it was provided that the said sum of $25,000 should be applied to the purchase price of the land, being $33.33 per acre, or a

total sum of $1,028,198.67, payable as therein provided. It was provided that Hole should drill "four proper and suitable wells for the discovery of oil and gas" on the property, two of which were to be commenced as soon after the date of such option as equipment could be obtained and installed and water provided therefor, and two more within sixty days after such completion or abandonment of said first two wells, using the same drilling equipment as used on the first two wells, he being privileged thereby to drill as many more wells within the time specified for drilling the said four wells as he should elect. In the event that the first two wells should prove to be "dry" and the latter two, or either of them, should not have been completed by January 1, 1912, the option to purchase was automatically extended "until the expiration of thirty days after the finding of oil or gas in the said last two wells and completion of same, or the abandonment of work on the same." These [19] were the provisions insisted upon by Green and Whittier and they had stated that they would not proceed with the transaction without them. While the option was negotiated in Hole's name, it was with the contractual understanding that it be turned over to Green upon consummation, he having agreed to furnish the $25,000 consideration therefor.

The aforesaid option was duly assigned to the petitioner by Hole on January 25, 1911, in consideration of the payment of $10 and other valuable consideration.

The petitioner was incorporated on January 25, 1911, for the purpose of acquiring the said interest covered by the option aforesaid existing between Hole and Emily B. Hopkins. The matter of incorporating the company was entrusted to one Sutton, who had been instructed by Green to proceed secretly, and in order that others should not be apprised of the purpose of its incorporation five clerks were used as the original incorporators. This was because the mention of either Green or Whittier would have aroused suspicions.

The petitioner held its first meeting of the board of directors on the date of its incorporation, at which a communication from Hole was submitted setting forth the fact that he held the aforesaid option of January 5, 1911, between himself and the said Emily B. Hopkins and agreeing to transfer it to the corporation in consideration of the issuance to him of the 999,995 shares of its stock, whereupon it was resolved that the said proposition of Hole be accepted in consideration of the issuance of such shares, and the initial issuance of stock, 1,000,000 shares, $1 par value, was made on January 26, 1911, as follows: [20]

Certificate No.		Number of Shares
1.	A. G. Peasley	1
2.	H. L. Westbrook	1
3.	G. C. Braniger	1
4.	W. G. Lackey	1
5.	T. McC. Todd	1
6.	W. J. Hole	999,995

Certificates numbered 1, 3, 4 and 5 were transferred to Green, Connell, Whittier and Buck, respectively, and certificate numbered 6, in the name of Hole, was divided, pursuant to prior understanding of the parties, between Hole and said Green, Connell, Whittier, and Buck, and 25,000 shares in trust for one Henderson, and such transfers and division were recorded in the books of the petitioner on February 1, 1911. Henderson was the proposed general manager of the company.

According to the "logs" of the first and second wells, begun on March 11 and March 18, 1911, respectively, and completed on April 21, 1911, and April 7, 1911, respectively, oil sand was first struck at between 445 and 480 feet and it produced 100 barrels of oil per day, 25.3 degrees Baumé, thirty days after completion, and oil sand was struck in the second well at between 350 and 360 feet and it produced 100 barrels per day, 26.5 degrees Baumé, thirty days after completion.

The respondent has excluded from the petitioner's invested capital for 1921 "Stock discount $974,995" representing that portion of the par value of capital stock, $999,995, issued in 1911 for the option upon the Hopkins property, in excess of the $25,000 originally paid therefor by Hole and his associates. [21]

OPINION.

MORRIS: While the respondent's deficiency notice covers deficiencies for the years 1921 to 1923,

inclusive, and while the petition states that the taxes "in controversy are income and profits taxes for the years 1921 to 1923, inclusive," the said petition, as amended, fails to allege error on the part of the respondent in other than the year 1921, and, since the evidence adduced at the hearing was confined to the issues pertaining exclusively to the year 1921, the respondent's motion, made at the hearing, to affirm his determination of the deficiencies for 1922 and 1923 is granted.

Our sole question for determination is the "actual cash value" of the option "at the time of" its payment for the capital stock of the petitioner on January 25, 1911. (Section 326 of the Revenue Act of 1921.) It is conceded by counsel for the respondent that if the value of the option is satisfactorily substantiated there is no question about its inclusion in invested capital to the extent justified by the proof.

The identical question here, affecting this same option, was presented to this Board for consideration in Belridge Oil Company, 11 B. T. A. 127, involving the years just preceding 1921, and we there sustained the respondent in his determination "that the option was worth on January 25, 1911, only what was paid for it on January 5 of the same year," i. e., $25,000. We concur in the views urged by the petitioner that the decision there, based upon the facts adduced at that time, which facts are not before us here, is not res adjudicata (Union Metal Manufacturing Company, 4 B. T. A. 287), but,

since the same property, the same issues, and the same [22] principles with respect thereto are involved here, a brief review of that case may prove helpful.

Premising its consideration of the question there presented, by directing attention to the terms of the option itself and to the fact that it was the result of negotiations between parties dealing at arm's length, that they were dealing with prospective oil lands, that by their agreement they provided for their exploration, that they fixed $25,000 as the actual cash cost of the option, the Board said:

> In our opinion, under the circumstances of this case, this agreement is entitled to great weight. It was executed in the light of such knowledge as the parties possessed about the character and value of the land. It does not appear that the parties were unadvised of any of the elements of its value, nor does it appear that any new proof of value was discovered between the giving of the option and its assignment to petitioner. The fact that one Van Slyke some time in 1910 discovered an outcrop of oil sand on the property is not shown to be controlling. This discovery preceded the giving of the option to Hole and for aught that appears the existence of this outcrop may have been known to Hole when he acquired the option. The evidence does not indicate that at the time of the assignment petitioner had any greater knowledge of the oil-bearing prop-

> erties of the land than had Hole when he took the option. When petitioner acquired the option the land was still unproven. No wells had been completed nor had the presence of oil in commercially profitable quantities been otherwise proven.

With the exception of the statement there made indicating the probability that Hole may have had knowledge of the existence of the outcroppings on this tract of land when he acquired the option, the same controlling principles discussed there obtain with equal force here. [23]

While it appears that Hole was acting for the interests of all concerned, it cannot be overlooked that he actually consummated the option with Mrs. Hopkins, and that he was in possession of no more nor less favorable information than Mrs. Hopkins, therefore, it must be concluded that the transaction here, as found in the former decision, was at arm's length and that the cash consideration therefor was arrived at based upon all of the factors then known to them. There was, so far as we are informed, no deception practiced between the parties who consummated the deal. Granting that Hole and Mrs. Hopkins were totally ignorant of the information in the possession of Green, Whittier and Van Slyke (although the record does not show and we have no way of knowing that Mrs. Hopkins was not in possession of such facts, or facts equally as valuable), Hole knew, and so did Mrs. Hopkins know, the strategic location of, and the fact that the land

contained prospective oil, and that was all that anyone knew with any degree of certainty. She could also reasonably infer that these men had informed themselves about the matter, and she may reasonably have suspected, and no doubt did, that they possessed valuable information about the land, otherwise they would not have been so willing and anxious, in fact, to venture $25,000 in the satisfaction of a mere empty curiosity. And it is not as though she, being an untrained woman in such matters, had been misled, because the entire transaction, as the record discloses, was supervised and consummated by her personal counsel and representatives, who must be presumed to have taken proper precautions to protect her interests. [24]

Let us review the evidence in support of the value contended for by the petitioner.

The record shows that the Associated Oil Company acquired acreage in Kern County, California, in 1910 at a cost to it of $66-2/3 per acre. The petitioner contends that that property was not as favorably located as the property in question. In fact one of its witnesses so testified and attempted to give his reasons therefor, which are far from convincing. The witness testified that for the reason stated that property was less valuable than the petitioner's tract. While we are reasonably convinced that the properties were similar in many respects, being in the same general locality, we are not convinced that they were less favorably located in respect to production than the petitioner's properties.

As we read the map before us, two of the tracts, there being five in all, were almost if not adjacent to the Lost Hills properties and within what appears to us to be a very short distance of producing wells. The other three tracts, as we locate them on the map, are as near, [25] if not nearer, to the Lost Hills territory, then a producing field, than the petitioner's tract. But our principal difficulty with this evidence lies in the fact that we do not know from the record what the state of development was with respect to this tract of land, whether or not oil had been discovered thereon at the time of its purchase at $66-2/3 an acre or whether it was virgin soil, and, therefore, comparable to the petitioner's tract. The evidence is very unsatisfactory respecting this purchase and consequently we are able to give it but very little weight in determining the "actual cash value" of the option in question.

Nor do we attach serious importance to the testimony of Green ad Connell respecting his and Whittier's purported offer of $500,000 for one-fifth of the capital stock of the petitioner which Connell owned, for the reason, among others, that as we view the testimony, the transaction had not sufficiently crystallized to be regarded as more than a trifling indication of value. Connell testified that he inquired of the members of the board of directors as to the methods to be employed in the development of the properties,—if they were to be extravagant—and he stated that if they were to be he might be compelled to sell his interest. Where-

upon Whittier inquired what he would take therefor but Connell made no reply. It was then that the purported offer was made, to which Connell testified "I changed the conversation and discussed the question of sale no further."

We have the testimony of Green, who qualified as an expert through his long and intimate association with the oil business, and Harry R. [26] Johnson, who qualified as an expert through his educational training in geology and his long experience in geological survey work, and, particularly his knowledge in the general region in question, and W. W. Orcutt, who also qualified as an expert through his educational training in geology and his later experience in the oil business.

Green testified that, in his opinion, the "actual cash" or "fair market value" of the land on January 25, 1911, was $100 an acre, based upon sales in the Lost Hills territory—with which the record shows he had no familiarity other than pure hearsay—and upon what he considered that other companies would have been willing to pay for the land had they possessed the information which he and his associates did.

Johnson, who visited the properties in question about two weeks before the hearing, apparently for the purpose of qualifying himself as a witness with respect thereto, was asked:

> Now, as a competent geologist, as a person who advised people in 1910, and in the second

> place taking into account and assuming the location of the structures reported by Mr. Van Slyke, and what in your opinion would a person have been authorized to pay, a person who is a willing purchaser and not compelled to purchase, to a willing seller, not compelled to sell, on January 25, 1911, a person being in possession of the information in possession of which Mr. Green and Mr. Whittier and Mr. Van Slyke were——

and he replied:

> Very close to three million dollars—two million nine hundred and some odd thousand.

He said that his opinion as to the value of said land was based upon his scientific education as a geologist, and years of experience plus several years in this region, which, at that time "was very active in [27] the transfer of properties." He did not, however, attempt to enlarge upon his knowledge of such transfers of property about which he spoke.

Orcutt, who visited the property about a week before the hearing, merely corroborated the general testimony of Johnson and testified, in reply to a hypothetical question somewhat similar to that put to Johnson, that, in his opinion, the fair market value of the land in 1911 was $2,700,000, based, as he said, upon the similarity of the outcroppings and structure of this property to that of Lost Hills and other fields and upon his scientific education in geology and his experience in the profession.

None of these witnesses testified to the actual cash value of the option itself, nor did they testify to any cases where similar options had been sold. In fact they demonstrated no knowledge on the subject of options.

The petitioner proposes that we accept the value of $2,700,000 placed upon the land by Orcutt, and it contends that the "actual cash value" of the option on January 25, 1911, when it was transferred to it, was the difference between that figure and the purchase price, $1,028,198.67, to be paid for the land in the event of the exercise of the option, or an actual cash value of the option itself of $1,671,801.33.

Assuming generally the correctness of the theory urged by the petitioner, we are confronted with this situation: an "actual cash" payment for the option in January, 1911, of $25,000, which the petitioner would have us supplant by a purely theoretical value, measured by the [28] value of the land, based upon opinion testimony supplied about twenty years after consummation of the transaction. Of course there are occasions where no actual cash is involved in the transaction, necessitating a substitute for tax purposes, but that is not the case here. It seems to us that if the theory urged by the petitioner, that is, of assigning a value to the option equal to the difference between the theoretical value of the land and the proposed purchase price thereof as set forth in the option, has any place in such

determinations of value at all, it should and necessarily must be confined to those cases in which no, or only a very nominal, consideration was given for the option and not where, as here, a very substantial price was paid, to-wit $25,000, and which appears to be the real cash value thereof at the time of the transaction.

Naturally, when property is purchased at a stated time for $25,000 and it is contended, twenty years later, that that same property would have sold for the huge sum of $1,671,801.33 cash at that time, the human mind becomes skeptical and requires considerably more than ordinary proof. Now all that we have, of any tangible importance, is opinion evidence of one man who was a party to the transaction and the testimony of two experts who visited the property just a few days before the hearing in order that they might visualize, and confirm if possible, conditions as they were supposed to exist thereon in 1911. It is because of the extremely flexible nature of opinion testimony that such should be carefully weighed. These witnesses testify unqualifiedly to the respective [29] values which we have referred to before and they did so primarily, if not entirely, from their geological observations. Witness Johnson testified that in this region all geology was on the surface. As we understand this, it may be reasonably inferred that any geologist might visit this particular piece of property and determine from surface formations that the property contained oil. If the matter was

so obvious to the trained expert, we are unable to understand why others who had already explored this field were unable to discover the presence of oil, for, as Green himself testified, other companies had scouts over the property, but had never discovered any indications of oil.

There is still another important factor which influences our conclusion and that is that Mrs. Hopkins had agreed to sell the entire tract of land, after the discovery of oil thereon, for $1,028,198.67, which figure was fixed with the most optimistic outlook that could possibly attend the development of the land, and consequently represents what the parties regarded the fair market value of the tract of land to be as a producing oil field, therefore, we cannot minimize this factor when the parties urge us to place a value on the option itself, in 1911, prior to the actual discovery of oil, of $1,671,801.33, or nearly $700,000 more for the option than the vendor was perfectly willing to sell the land for as, if and when it should become a producing oil field.

Then, too, the testimony of these experts is retrospective in its nature, a factor which must be considered in weighing the evidence. A somewhat analogous situation was presented in Thomas H. Tracy et al., 15 B. T. A. 1107, where the petitioner introduced various real estate [30] men to testify to the March 1, 1913, value of certain realty. With respect to their testimony the Board premised its considerations by saying, "None of these witnesses

had actually made an appraisal of the Manhattan property in 1913, but were expressing their opinion at the present time of what the value of the property was in 1913," which is true here, and, continued the Board, "This testimony, then, is retrospective in its nature and is subject to the weaknesses of that type of appraisal." Upon rejection by the Board of the values testified to there the matter was reviewed by the Circuit Court of Appeals in Thomas H. Tracy v. Commissioner, ... Fed. (2d) ..... It was there contended that the only evidence of value introduced before the Board being opinion evidence of experts, the Board was under obligation to accept the petitioner's valuation, and the court said:

> * * * While the opinions of experts are competent and often very helpful, such evidence is not considered binding upon the tribunal before which it is produced, at least not to the extent that such tribunal is bound to follow it if contrary to the best judgment of its members. Anchor Co. v. Commissioner, 42 F. (2d) 99 (C. C. A. 4); Am-Plus Storage Battery Co. v. Commissioner, 35 F. (2d) 167 (C. C. A. 7). But it is true that no administrative board may act arbitrarily and without evidence, and this suggests other questions which here arise, viz., whether there was substantial evidence before the Board to support its findings and, if so, the effect to be given to this fact.

See also Uncasville Mfg. Co. v. Commissioner, 55 Fed. (2d) 893.

In reaching the conclusion which we deem inescapable we do not do so arbitrarily, nor have we substituted our own "knowledge, experience and judgment" for the opinions of these experts. There are two bases [31] of valuation of record, not merely the one which the petitioner would have us accept, and after carefully weighing all considerations pertaining to each of them the result is that we are forced to reject the valuations tendered by these experts and to adopt the other. In other words, we are not convinced from the evidence that the theoretical "actual cash value" should be substituted for the value as measured by "actual cash." Compare Van Kannel Revolving Door Co., 11 B. T. A. 1209, affirmed at 36 Fed. (2d) 1022, and Keystone Wood Products Co., 19 B. T. A. 1116.

Reviewed by the Board.

Judgment will be entered for the respondent.

McMAHON dissents; dissenting opinion to be filed later. [32]

McMAHON, dissenting: I do not agree with the majority opinion in holding that the option for the sale of the Hopkins land (sometimes referred to as the Belridge property in the record) in fee simple, under the favorable conditions to the purchaser giving him at least one year in which to exercise the option at so favorable a price as $33-1/3 per acre, had an actual cash value of only $25,000 at the time such option was paid in to petitioner for stock.

Since I presided at the hearing in this proceeding and had an opportunity to see the witnesses upon the witness stand, all of whom were called by the petitioner, and observe the candor, earnestness, sincerity and intelligence with which they testified, I feel that I would be derelict in my duty if I did not make known my views fully.

The valuation of $25,000 placed upon the option in the majority opinion is based primarily upon the fact that such option, which was entered into on January 5, 1911, provides for the payment by Hole of $25,000 and that this was the amount furnished by Green and paid by Hole for it. An essential question for determination here is whether that transaction establishes the actual cash value of the option, notwithstanding the infirmities of the transaction and the rather voluminous evidence in the record to the contrary.

The proceedings of the Board and its Divisions are conducted in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. (Sec. 907(a) of the Revenue Act of 1924, as amended by Sec. 601 of the Revenue Act of 1928.) It has been held by the courts of the District of Columbia that evidence of a "fair sale" of the same property, when not too remote from the date of valuation (the element of remoteness is not in question here), may outweigh expert opinion evidence, standing alone, upon the subject of value; and no presumption or prima facie showing of the correctness of the value fixed by the sale arises

unless the sale is a "judicial" or "fair public" sale. Andrews v. Commissioner, 38 Fed. (2d) 55; affirming Estate of Effie Andrews, 13 B. T. A. 651; Hazelton v. Le Duc, 10 App. D. C. 379; and Ruppert v. McArdle, 42 App. D. C. 392. Since there was no "judicial" or "fair public" sale effected in the instant proceeding, no such presumption arises and no such prima facie showing has been made. On the other hand, the sale of the option, relied upon by the majority opinion (as appears therefrom) as a basis for valuation in this proceeding, was not a "fair sale," as will be pointed out presently, and hence it can not be permitted, under any rule established by these cases, to outweigh expert opinion evidence upon the subject of value, standing alone, or otherwise. Furthermore, the expert opinion evidence upon the subject of value in the instant proceeding, does not stand alone. On [33] the contrary, it is well corroborated and fortified by other undisputed facts and circumstances, many of which are inherent in the situation, as will likewise be pointed out.

In passing it may be said that no authority has been found to support the view that the value fixed in any sale made at or near the date of valuation is conclusive of the value of the property in question at such date as against all evidence or as against expert opinion evidence, standing alone, or that it is the best evidence in the sense that no other evidence will be used as a basis for determining such value. This view, if enforced in any case,

might give rise to the question as to whether it would be in violation of the Fifth Amendment to the Federal Constitution in so far as it guarantees due process of law. Cf. Heiner v. Donnan, 285 U. S. 312; Schlessinger v. Wisconsin, 270 U. S. 230; United States v. Lee, 106 U. S. 196; and Zeigler v. South & North Ala. R. R. Co., 58 Ala. 594.

With regard to the establishing of fair market value, the following appears in Andrew B. C. Dohrmann, 19 B. T. A. 507:

> We think it is well settled that whether property at a given date has a fair market value or not is a question of fact to be determined from all of the evidence introduced and admitted in each individual case; that no set rule or formula can be employed; and that in weighing and sifting the evidence the fact to be found, if it exists, is the cash price at which a seller willing but not compelled to sell and a buyer willing but not compelled to buy, both having reasonable knowledge of all the material circumstances, will trade. Walter v. Duffy, 287 Fed. 41; Phillips v. United States, 12 Fed. (2d) 598; Heiner v. Crosby, 24 Fed. (2d) 191; O'Meara v. Commissioner, supra; Ault & Wilborg Co., supra; and James Couzens, 11 B. T. A. 1040.

This applies with equal, if not greater, force to the instant proceeding, which involves the determination of actual cash value.

Looking to substance and not mere form, it appears that Hole, in negotiating for the second option, was in reality acting in behalf of the group composed of himself, Green, Whittier, Connell and Buck. Green furnished the $25,000 for Hole to pay for the option. Thus in the negotiations for the option the real parties were the group, on the one hand, and Mrs. Hopkins, on the other. Green and Whittier, the two moving spirits, had actual knowledge of the presence of oil sands on the land, whereas the inference to be drawn from the evidence is that Mrs. Hopkins did not have such knowledge. The evidence shows that Green and Whittier were very careful to keep their knowledge secret; and even Hole did not have such knowledge.

In the majority opinion it is stated that "the entire transaction, as the record discloses, was supervised and consummated by her personal counsel and representatives, who must be presumed to have taken proper precaution to protect her interests." Any such presumption [34] that might be indulged in in the ordinary case can not apply here in the face of the evidence, which shows that Hole paid one Benedict, a nephew of Mrs. Hopkins, $125,000 for his services and influence in negotiating this option; that Hole also enlisted similar services and influence of William Hill, Mrs. Hopkins' manager, for which he paid Hill $35,000 and agreed to give him *one-fourth of the stock* which he (Hole) was to receive in the corporation to be organized; and that Mrs. Hopkins' attorney was "anxious" for

Mrs. Hopkins' nephew to "make something." The option was not signed by Mrs. Hopkins, but was signed on her behalf by her counsel as attorney in fact. This option called for a price for the land of $33-1/3 per acre, whereas the first option which Mrs. Hopkins had granted to Hole called for a price of $20 per acre for the land. It was understood by Mrs. Hopkins' attorney that the difference of $13-1/3 per acre to be paid under such option should go to Hole, and that Mrs. Hopkins would only get $20 per acre for the land if the option were exercised. The evidence definitely shows that Mrs. Hopkins did not have intimate management of the property. The inferences to be drawn from this situation are that Mrs. Hopkins did not know of the price of $33-1/3 per acre provided in the option, or that Hole was to receive the difference of $13-1/3 per acre. The evidence does not disclose that Hill, Benedict, or Mrs. Hopkins' attorney knew of the discovery of oil sands on the property; but, even if they did, it is apparent that they would not have advised Mrs. Hopkins of the fact, for the reason that they were all personally interested, for one reason or another, in seeing the option granted to Hole. In so far as Mrs. Hopkins and Hole dealt for an option covering the land in question, the actual cash value of the option is not reflected for the reason that neither of them had knowledge of the existence of the numerous indications that this was oil land. Hole's principal experience had been in agricultural land and he was not an experienced

oil man like Green and Whittier. In so far as Hole dealt in reference to this option with Green and Whittier or with the petitioner, the actual cash value is not reflected, for the reason that Hole did not have this knowledge of the existence of these indications of oil upon the land. Furthermore, Mrs. Hopkins and her representatives, on the one part, and Hole, on the other part, were not dealing as strangers or at arm's length. They were dealing at close range. If a sale is made under peculiar circumstances, and we have such here, it does not establish market value. See Weed v. Lyons Petroleum Co., 294 Fed. 725, at page 734. The facts and circumstances and the infirmities pointed out above take the sale out of the category of a "fair sale" for the purpose of establishing actual cash value of the option, and also fail to satisfy the requirements pointed out in Andrews B. C. Dohrmann, supra, to the effect, among [35] others, that both parties to a trade must have reasonable knowledge of all the material circumstances.

It should be pointed out, however, that the petitioner was not a party to this deal with Mrs. Hopkins. Petitioner was not in existence then. Furthermore, no question is raised here as to the legality of the transaction. Mrs. Hopkins and those in privity with her are the only parties who might successfully raise questions as to the validity of that transaction. See Taplin v. Commissioner, 41 Fed. (2d) 454. They are not before us. The only

question before us is that of the actual cash value of the option.

Hole was willing to pay a great deal more than $25,000 to procure the option, and he did in fact pay, besides the $25,000 furnished by Green, $160,000 in cash and transferred one-fourth of the stock which he received in the petitioner corporation, or a total of more than $185,000. The very fact that Hole actually did pay out a total of at least $185,000 to procure this option leads to the inescapable inference that the option had a value far in excess of $25,000. The actual cost of procuring the option is at least $185,000. In addition to this $185,000, Hole was required to deliver to Hill one-fourth of Hole's share of petitioner's corporate stock. Hole thus paid over $185,000 to procure the option, notwithstanding that he did not know that Van Slyke had discovered outcroppings of oil on the land, which were confirmed by others. It must be inferred from the evidence that, if Hole had known what Van Slyke and others knew in this respect, he would have put a higher value on the option. He testified that if he had known this, he would not have sold the land at $33⅓ per acre.

There is evidence to show that on September 2, 1910, the Associated Oil Company purchased, for $66⅔ per acre, 24,000 acres of prospective oil land located a little closer to the producing Lost Hills oil property than the Hopkins land. That transaction is more convincing upon the question of value before us than the evidence of the sale of the

option with all of the infirmities inherent therein, as pointed out above.

In the majority opinion it is stated in effect that this sale of property to the Associated Oil Company is not entitled to much weight, for the reason that the record does not show its state of development. The map, petitioner's Exhibit 6, demonstrates that none of that property was developed as oil land previous to 1911 and that previous to 1911 there were no indications of oil or gas upon that land. Furthermore, it is established by other evidence that that land had not been proven to be oil land and that it was merely prospective undeveloped oil land, as was the property in question here. Harry R. Johnson, of whom more will be said later, testified that the closest [36] proven oil territory to the property purchased by the Associated Oil Company at that time was a part of the Lost Hills Field. He testified that the land acquired by the Associated Oil Company was not in as good prospective oil territory as the property involved here and was less valuable for oil. The map shows that the Hopkins land was located closer to producing oil lands than was the Associated Oil Company's property. The Hopkins land was near Gould Hill, Temblor Valley, and the McKittrick Field, which were at that time better established oil fields than the producing portion of the Lost Hills area, which was the closest proven oil territory to the land of the Associated Oil Company. The Hopkins land was about three miles north of Gould Hills, about

six miles north of the Temblor Ranch Field and the McKittrick Field, and was not more than eight miles south of the producing area of Lost Hills.

There is also convincing expert testimony in the instant proceeding which establishes an actual cash value for the option greatly in excess of $25,000. The expert witnesses were Burton E. Green, Harry R. Johnson, and W. W. Orcutt.

Green went into the oil business in 1895 and, at various times, operated in the northeastern part of the Los Angeles Field, in the Coalinga Field, and in the McKittrick Field, and was instrumental in the organization of several oil companies including the Green-Whittier Oil Company, the Associated Oil Company, the Amalgamated Oil Company, the West Coast Oil Company, and the Inca Oil Company. He was familiar with the developments that had taken place in the Midway Oil Field and the Lost Hills section, and he had developed the McKittrick Field. At the hearing Green testified that the outcroppings of oil on the Hopkins land were quite similar to those in the Lost Hills section. He testified that all the outcroppings which he had ever approved resulted in the development of oil fields, including the Coalinga Field, McKittrick Field, the Kern River Field, the La Habra Field, and the Wolfskill property. He testified that the fair market, or actual cash, value at January 25, 1911, of the Hopkins land was at least $100 per acre, that he would have paid $100 per acre for it, and that he was in financial condition to do so. He

further testified that if other companies had known the facts which he and Whittier knew about the property he and Whittier would not have been able to obtain the land for $100 per acre. He stated that the Lost Hills territory had been under development for about a year before the petitioner obtained the option and that land in that section had sold for as high as $100 per acre. These sales had taken place after oil croppings had been exposed and a shallow hole had been drilled. The land sold was located some distance from this shallow hole and in a portion of the Lost Hills area which was not as favorable for oil. [37]

Johnson is a consulting petroleum geologist. He graduated from Leland Stanford University about 1905 or 1906. Thereafter, he reentered the United States Geological Survey, with which he had been associated even before he entered college, and in 1908 did extensive work in examining the geologic structure of the general region in which the property in question is located, and in compiling Government bulletins in connection therewith. In 1911 he personally became informed of the conditions of the Hopkins land as found in 1910 by Van Slyke. He visited the property with Van Slyke shortly before the hearing in this proceeding and verified all material conditions found by Van Slyke in 1910, which were substantially the same as they were shortly before the hearing. These material conditions of 1910 were likewise verified shortly before the hearing by W. W. Orcutt, of whom more will

appear later. After his resignation from the United States Geological Survey in 1909, Johnson went into private business in Los Angeles. Such business consisted of examining and valuing oil areas and advising clients as to prices to be paid for prospective oil lands. At the hearing he testified that Van Slyke's findings of oil indications in 1910 should have caused a practical oil man like Van Slyke to reach the natural and almost inevitable conclusion that the Hopkins land was valuable oil land, that a person having the knowledge of the Hopkins land which Green and Whittier had in 1910 would have been justified in paying approximately $2,900,000 for it, and that he would have advised clients to purchase the property under those conditions at that price. He testified that that was its fair market value as of January 25, 1911, prior to any actual discovery of oil on the property, beyond that made by Van Slyke.

Orcutt graduated from Leland Stanford University in 1895, with the degree of A. B., after pursuing the study of geology as a major subject. He was thereafter employed by the Union Oil Company to organize their geological department. He was later chief engineer and manager of the geological and land department of that company and still later became vice president. That company at first had a capitalization of about $50,000,000. Later its capitalization was increased to $100,000,000. He leased and purchased oil lands for the Union Oil Company and was so employed in 1910 and 1911.

He testified that if on January 25, 1911, he had known the facts which Green knew about the Hopkins land on that date, and he had been advising his employer, the Union Oil Company, or any other party, what to pay for the property, he would have recommended that they pay $2,700,000. This, he testified, was the fair market value of the property as of that date. His opinion was based in part upon the similarity of the outcroppings and structure of this [38] area with that of the Lost Hills section, the Buena Vista Field and several other oil fields throughout southern and central California.

The opinions of all of these experts as to the value of the Hopkins land were well fortified by reasons and were borne out by the fact that, promptly after petitioner obtained the option in question, producing oil wells were brought in on the land. The logs of the first two wells which were sunk by the petitioner on the Hopkins land were received in evidence for the limited purpose of corroborating the findings of Van Slyke made in 1910, which were confirmed by Green in the same year and by Johnson and Orcutt shortly before the hearing in the proceeding, and for no other purpose. No attempt was made to prove the value of the option in question by showing how many wells were sunk, how much oil was produced by each, and what profits were made by the petitioner. Such evidence would be inadmissible. Green did testify, without objection, that the development of the oil

lands covered by the option in question was successful.

These expert witnesses were intelligent, candid, and well qualified to express opinions as to the value of the land which was the subject of the option, and their testimony shows that it had a value greatly in excess of the price at which it could be purchased under the option. None of them was impeached. Their expert opinions were not met or rebutted by similar proof to the contrary. Their expert opinions stand undisputed in the record. Their expert testimony is in fact corroborated by other competent, credible, persuasive evidence, much of which is inherent in the situation. This expert opinion evidence, together with this other evidence in line with it, should be used together with all of the competent evidence upon the subject in arriving at the actual cash value of the option. There is nothing in the record to outweigh it all. No mere presumption or prima facie showing can stand as against it all. See Montana Ry. Co. v. Warren, 137 U. S. 348, and more particularly the discussion at pages 352 to 354. That case involved the value of mineral lands and sustains the view that expert opinion evidence as to value is peculiarly helpful and looked upon with favor in a situation such as we have here. See also Troxel Mfg. Co., 1 B. T. A. 653; and Bowman Hotel Corporation, 24 B. T. A. 1193, more particularly at page 1210.

Once the value of the land is established, the value of the option can be readily determined. The actual

cash value of an option is the difference between the value of the land and the price at which it can be obtained under the option. Karl von Platen, 10 B. T. A. 250; Realty Sales Co., 10 B. T. A. 1217; Robert Brunton Studios, Inc., 15 B. T. A. 727; and United Studios, Inc., 15 B. T. A. 737. [39]

To the effect that an option is tangible property, see section 325 of the Revenue Act of 1921, Nansemond Brick Corporation, 8 B. T. A. 1117, and Reserve Natural Gas. Co., of Louisiana, 15 B. T. A. 951. It should therefore be included in petitioner's invested capital for the years in question at its actual cash value. (Sec. 326 (a) (2), Revenue Act of 1921.)

The majority opinion also relies upon our decision in Belridge Oil Co., 11 B. T. A. 127, which was a proceeding between the same parties as are here concerned, and wherein it was held that the value of this same option for invested capital purposes for the years 1917 and 1920 was $25,000. While that decision is not res judicata in the instant proceeding, findings of fact in a proceeding before the Board under the Revenue Act of 1924 are prima facie correct in subsequent proceedings before the Board between the same parties, when properly introduced, as they were in the instant proceeding. Union Metal Mfg. Co., 4 B. T. A. 287; Goodell-Pratt Co., 6 B. T. A. 1235; American Steel Co., 7 B. T. A. 641; American Seating Co., 14 B. T. A. 328; affd., Commissioner v. American Seating Co., 50 Fed. (2d) 681 (C. C. A., 7th Cir., June 27, 1931).

However, findings of fact made by the Board in a prior proceeding, being mere prima facie evidence, may be rebutted in a subsequent proceeding between the same parties before the Board. See Charles M. Monroe Stationery Co., 15 B. T. A. 1227, wherein we stated that the decision in Charles M. Monroe Stationery Co., 3 B. T. A. 69, was consistent with the evidence there presented, but that in the proceeding under consideration there was present a different state of evidence.

The evidence introduced by petitioner in this proceeding overcomes the presumption in favor of the correctness of the value found in Belridge Oil Co., 11 B. T. A. 127. In that proceeding there was lacking evidence which appears in the instant proceeding, namely, evidence of the infirmities of the sale of the option, the actual cost of the option of over $185,000, the acquisition by the Associated Oil Company in September, 1910, for $66⅔ per acre, of property in Kern County, California, which was comparable to the land in question, expert testimony upon the question of value, and other evidence which did not appear in the prior proceeding, as herein set forth. The testimony of four witnesses, Hole, Clute, Gillan, and Van Slyke, was offered in the prior proceeding upon the question of the value of the land as oil land. The testimony of two of them, Hole and Clute, was stricken. Gillan expressed his opinion as a layman, and not as an expert. The opinion of Van Slyke, whose testimony shows that he was not qualified to testify as an

expert on value, was received without objection. Thus, in the prior proceed- [40] ing there was no expert opinion evidence of the value of either the land as oil land, or of the option.

In the opinion in the former proceeding in regard to the transaction by which Hole acquired the option, it is stated:

> * * * The fact that one Van Slyke sometime in 1910 discovered an outcrop of oil sand on the property is not shown to be controlling. This discovery preceded the giving of the option to Hole and for aught that appears the existence of this outcrop may have been known to Hole when he acquired the option. The evidence does not indicate that at the time of the assignment petitioner had any greater knowledge of the oil-bearing properties of the land than had Hole when he took the option. * * *

The evidence in the instant proceeding discloses that Hole did not know of the discovery of an outcrop of oil sand on this property. He testified that if he had known what Green and Whittier knew in this respect he would not have parted with his option for the consideration which he received for it. The evidence further shows that at the time of the assignment of the option to the petitioner, the stockholders (and more particularly the moving spirits, Green and Whittier) other than Hole did have greater knowledge of the oil-bearing properties of the land than had Hole when he took the option.

We are not called upon to here reconsider or review the correctness of the Board's decision in Belridge Oil Co., 11 B. T. A. 127, and no criticism of it is being offered. But the proof is radically different in the instant proceeding.

The Board's decision in the former proceeding has been invoked, in the majority opinion, as a precedent for the instant proceeding. As such it has no value, for the reason that it is clearly distinguishable upon the facts, as fully pointed out herein. As a precedent, it is not binding. To hold otherwise would lead to the same result as to hold that the former decision is res judicata. The majority opinion recognizes that it is not. Since this is true, we are in the same position as we would be in if there had been no former proceeding, with the exception of the prima facie showing based on the Board's former finding of the value of the option; and that, as pointed out herein, has been overcome by the proof which appears here and did not appear there.

The only evidence offered by the respondent in the instant proceeding consists of the findings of the Board fixing the value of the option in this former proceeding. In doing this he merely made a prima facie showing, which was rebuttable. His proof accomplished nothing else. A careful examination of the entire record discloses that there is nothing to support the position of the respondent in which he limits the actual cash value of this

option for invested capital purposes to $25,000, except rebuttable presumptions or their [41] equivalent. The first presumption is that his determination in this respect is correct. The second presumption or its equivalent arises from the prima facie showing that was made when he offered the findings of the Board in Belridge Oil Co., 11 B. T. A. 127, as evidence of the value of this option as therein fixed at $25,000 for similar purposes for previous years. A presumption, such as we have here, is not proof, as was stated in Heiner v. Donnan, supra. As stated there, it is merely a substitute for proof and is open to challenge and disproof. A prima facie showing, such as we have here, is not stronger. Both of them have been rebutted, disproved, and overcome. In this situation the burden of proof shifted to the respondent. He has done nothing to discharge his burden in this respect.

Notwithstanding any presumption in favor of the respondent or prima facie showing made for him, the evidence adduced at the hearing establishes a value of the land substantially in excess of the price at which it could be purchased under the option and an actual cash value of the option substantially in excess of $25,000.

Any statements or comments of fact made herein by way of supplement to the findings of fact of the majority of the Board will be found to be supported by evidence which is not disputed.

Obviously, it is not the province of a dissenting opinion to fix another value in excess of $25,000. That is within the province of the majority of the Board. [42]

United States Board of Tax Appeals.

Washington.

Docket No. 31,218

BELRIDGE OIL COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated August 16, 1932, it is

ORDERED and DECIDED: That there are deficiencies as follows:

Year	Deficiency
1921	$45,293.85
1922	4,692.89
1923	4,684.91

Entered Aug. 17, 1932.

[Seal] EUGENE BLACK,

Member. [43]

[Title of Court and Cause.]

PETITION FOR REVIEW TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now Belridge Oil Company, a corporation, by its attorneys, Claude I. Parker, John B. Milliken and Llewellyn A. Luce, and respectfully shows:

I.

The petitioner on review (hereinafter referred to as the taxpayer), is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal office located at Los Angeles, California. The respondent on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. The income tax returns of the taxpayer for the calendar year 1921, being the taxable year [44] involved herein, were filed with the Collector of Internal Revenue for the Sixth District of California, and the office of said Collector is located within the Judicial Circuit of the United States Circuit Court of Appeals for the Ninth Circuit.

II.

The Commissioner determined a deficiency in income and excess profits tax for the calendar year

1921 in the sum of $45,293.85 and on July 18, 1927, in accordance with the provisions of Section 274 of the Revenue Act of 1926, sent to the taxpayer by registered mail a notice of said deficiency. Thereafter the taxpayer filed an appeal from said notice of deficiency with the United States Board of Tax Appeals.

The hearing of said appeal to the United States Board of Tax Appeals was held in Los Angeles, California, on the 22nd day of May, 1930, before Honorable Stephen J. McMahon, Member, presiding. On August 16, 1932, the Board promulgated findings of fact and opinion in said appeal and on August 17, 1932, the Board entered its decision in said appeal wherein and whereby the Board ordered and decided the amount of deficiency against the taxpayer for the calendar year 1921 to be $45,293.85.

III.

The deficiency which was in controversy before the United States Board of Tax Appeals for the year 1921 arose or resulted from the determination of the Commissioner that the invested capital, as claimed by the petitioner for said year 1921, [45] should be reduced by the sum of $974,995.00. In the year 1911, the taxpayer issued its stock in the amount of one million shares, par value one dollar per share, in exchange for an option to purchase certain real estate. In its income and excess profits tax return for said calendar year 1921, the taxpayer

included in its invested capital for tax purposes the par value of the stock issued for the option. The Commissioner refused to permit the taxpayer to include in its invested capital the sum of $1,000,000.00 and allowed and permitted it to include only the sum of $25,005.00 and excluded therefrom the sum of $974,995.00. The Commissioner further determined and held that the actual cash value of said option for which one million shares of stock were issued had an actual cash value on the date taxpayer acquired it of only $25,000.00.

The question at issue is, therefore, what was the actual cash value of the option in 1911 when taxpayer issued its stock in exchange for same. The Commissioner determined the actual cash value to be $25,000.00 and petitioner corporation contends and submits said actual cash value was at least $975,000.00.

IV.

The taxpayer says that in the record and proceeding before the United States Board of Tax Appeals and in the decision and order of redetermination rendered and entered by the United States Board of Tax Appeals, manifest error occurred and intervened to the prejudice of the taxpayer. The taxpayer assigns the following errors, and each of them, which it avers occurred [46] in the said record, proceeding and order of redetermination and upon which it relies to reverse said decision and order of redetermination so rendered and entered by the United States Board of Tax Appeals, to-wit:

(1) The United States Board of Tax Appeals erred in making and entering its decision in this cause and in entering judgment in favor of Commissioner and against taxpayer.

(2) The United States Board of Tax Appeals erred as a matter of law and fact in deciding that the option which taxpayer acquired on January 25, 1911, had only a value, for invested capital purposes, of $25,000.00.

(3) The United States Board of Tax Appeals erred, as a matter of law, in disregarding the competent testimony of qualified witnesses that the option which taxpayer acquired on January 25, 1911, had an actual cash value of at least $1,000,000.00 for invested capital purposes.

(4) The United States Board of Tax Appeals erred in its conclusions of law and its application of the law to the facts.

(5) The United States Board of Tax Appeals erred in that the decision, opinion and order of the Board are contrary to the evidence and are not supported by the evidence.

(6) The United States Board of Tax Appeals [47] erred in redetermining a deficiency against this taxpayer for the year 1921 amounting to $45,293.85.

(7) The United States Board of Tax Appeals erred in that there is neither in the findings of fact by the Board nor in the opinion

by the Board, any findings of fact to sustain the Board's conclusions of law as set forth in the Board's opinion and decision.

(8) The United States Board of Tax Appeals erred in that its conclusions of law stated in its opinion are contrary to and not in harmony with the Board's findings of fact.

(9) The United States Board of Tax Appeals erred in that the opinion and decision of the Board, based upon the Board's findings of fact, are contrary to law.

WHEREFORE, the taxpayer petitions that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit and that a transcript of the record be prepared in accordance with law, and with the rules of said Court, and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of be reviewed and corrected by said Court.

CLAUDE I. PARKER,
JOHN B. MILLIKEN,
808 Bank of America Bldg.,
Los Angeles, California,
LLEWELLYN A. LUCE,
937 Munsey Building,
Washington, D. C.,
Counsel for Taxpayer-Petitioner. [48]

District of Columbia.—ss.

Llewellyn A. Luce, being first duly sworn, says:

That he is attorney of record for the above named taxpayer-petitioner, and as such is duly authorized to verify the above and foregoing petition for review to the United States Circuit Court of Appeals for the Ninth Circuit; that he has read said petition for review and is familiar with the statements therein contained and that the facts therein stated are true, except such facts as may be stated on information, and those facts he believes to be true.

LLEWELLYN A. LUCE.

Subscribed and sworn to before me this 14th day of November, 1932.

[Seal] NEEL V. PRICE,
Notary Public in and for the District of Columbia.

[Endorsed]: Filed November 15, 1932. [49]

[Title of Court and Cause.]

NOTICE.

To Hon. C. M. Charest,
General Counsel, Bureau of Internal Revenue,
Washington, D. C.
Counsel for Respondent on Review.

Notice is hereby given you that Belridge Oil Company, petitioner on review in the above entitled

proceedings, did on the 15th day of November, A. D. 1932, file with the United States Board of Tax Appeals at Washington, D. C., petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision rendered by said Board of Tax Appeals in said proceeding, a copy of which said petition for review is hereby served upon you.

CLAUDE I. PARKER,
JOHN B. MILLIKEN,
808 Bk. of America Bldg.,
Los Angeles, California,
LLEWELLYN A. LUCE,
937 Munsey Bldg., Washington, D. C.
Counsel for Petitioner on Review. [50]

Service of the foregoing notice and of a copy of the petition for review mentioned in said notice is acknowledged this 15th day of November, A. D. 1932.

C. M. CHAREST,
Counsel for Respondent on Review.

[Endorsed]: Filed November 15, 1932. [51]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE.

The following is a statement of evidence, partly in narrative form and partly in verbatim question and answer form, and other proceedings in the above entitled cause.

This cause came on for hearing before the Honorable Stephen J. McMahon, Member of the United States Board of Tax Appeals, on May 22, 1930, at Los Angeles, California. J. B. Milliken, Esq., appeared for the petitioner and R. W. Wilson, Esq., Special Attorney, Bureau of Internal Revenue, appeared for the respondent.

TESTIMONY OF W. J. HOLE, FOR PETITIONER.

W. J. Hole was called as a witness by and on behalf of the petitioner and having been first duly sworn, was examined [52] and testified as follows:

My name is W. J. Hole. I reside at 114 Fremont Place, Los Angeles, and have resided in the State of California for the last thirty-six or thirty-seven years. I am at present a retired business man and during the years 1910 and 1911 I was resident agent in Los Angeles for the Stearns Rancho Company. During the years 1910 and 1911 and prior thereto, I was dealing on a large scale for my own account in real estate. The Stearns Rancho Company owned about 300,000 acres of land in Southern California. The Company was composed of Edward Hopkins and Emily B. Hopkins of New York.

Prior to 1910 and 1911 on my own account I transacted business with respect to purchases on a relatively large scale. It was my business custom in 1910 and 1911 to buy up large parcels of real estate either by outright purchase or to secure options on real estate for the purpose of subsequent sale at a profit.

(Testimony of W. J. Hole.)

The MEMBER.—Did I understand the witness to say that he bought and sold for the Stearns Rancho Company?

Mr. MILLIKEN.—He was agent for the Stearns Rancho Company, which company he testified owned approximately 300,000 acres of land in Southern California and he also acted on his own account, independent of them.

The MEMBER.—Did you buy and sell for the Stearns Rancho Company?

The WITNESS.—No, not buy.

The MEMBER.—You sold for them?

The WITNESS.—Sold for them. [53] In other words, they owned 300,000 acres and I was their agent with respect to the disposition of that property and the sale of it.

For six or seven years prior to 1910 I had been familiar with the property in Kern County, California, owned by Emily B. Hopkins, comprising some 31,000 acres of land. Emily B. Hopkins owned about 55 per cent of the Stearns Rancho Company, she lived in New York and was represented here by Stearns Rancho Company, C. A. Grove and William Hill.

Q. Do you feel, or do you not feel that, by reason of your business relationship with Mrs. Hopkins, that you were able to obtain from her any special business considerations, if it came to a question of getting an option on her property here?

(Testimony of W. J. Hole.)

A. Yes, sir.

Q. Why did you have such belief?

A. Well, I had been very successful with the Stearns Company lands and C. A. Grove had promised me if at any time that land was put up for sale to anyone I was to have first chance at it.

In 1910 Mrs. Hopkins was probably fifty years of age. She resided in New York and did not have intimate management of her property but left such matters to the Stearns Rancho Company. Prior to 1910, I was advised by the secretary of the Stearns Rancho Company that other persons were attempting to obtain an option from Mrs. Hopkins on her property situated in Kern County and that if I desired to obtain an option on the same, I must proceed with dispatch.

I first secured an option from Mrs. Hopkins about May, 1910. It was a written option. I have made repeated efforts to find the option but without success. During 1919 I severed my [54] connections with the Stearns Rancho Company and destroyed many of my old records and I believe the option which I secured from Mrs. Hopkins in 1910 must have been destroyed at that time. I remember the terms of the option obtained in May, 1910. I secured an option on the 31,000 acres of land of Mrs. Hopkins located in Kern County, California—the option was to run for one year and called for the purchase of the land at twenty dol-

(Testimony of W. J. Hole.)

lars per acre. There was no consideration, except friendship, passing between Mrs. Hopkins and myself for the option. Mrs. Hopkins is now dead as is her manager for this property who was William Hill.

I acquired the option from Mrs. Hopkins because I thought the land was good agricultural soil with a possibility of securing from Kern River a water supply and also, because the land lies between McKittrick and Lost Hills, I thought it would present a very good prospect for oil on some of the land. After I secured the option I endeavored to interest others in purchasing the same.

I knew very well one, M. H. Whittier, now dead and that he was recognized as an oil expert. I went to see him, told him of the land in question and its possibilities, advising him that I had an option upon the same. He agreed to look into the matter with a view to taking it over. M. H. Whittier also took me to see Mr. Burton E. Green. They asked me what I would take for the land to be purchased on an option and I told them thirty three and a third dollars an acre, and to retain for myself a one-fifth interest in the company to be organized to take it over. They immediately accepted, did not argue or haggle over the price and it was the quickest deal I ever made.

Mr. Green asked me what the option cost me and I explained that that was no one's business but my own. There were [55] some provisions in the op-

(Testimony of W. J. Hole.)
tion that Green and Whittier did not desire and we proceeded to have the option changed to conform with their demands. I did not represent Green and Whittier in negotiating these changes in the option but represented myself.

I secured an option from Mrs. Hopkins which is dated January 5, 1911, which met with and conformed to their demands.

There was then offered and received in evidence petitioner's exhibit No. 1, a copy of which is attached hereto and by this reference made a part of this statement of evidence. Said exhibit 1 is the option dated January 5, 1911, which Hole secured from Mrs. E. B. Hopkins and which he turned over to Whittier and Green.

The MEMBER.—Bakersfield is in Kern County?

The WITNESS.—Yes.

The MEMBER.—How far is this land from Bakersfield?

The WITNESS.—55 or 60 miles.

In the option of January 5, 1911, there is a provision whereby Mrs. Hopkins agreed to let the holders of the option have one year within which to drill four wells on the property and if at the end of one year the four wells had not been completed there could be such extended time within which to exercise the option as the parties might agree upon, and if the option was exercised the price for the purchase of the property should be

(Testimony of W. J. Hole.)

33⅓ dollars per acre. These provisions were insisted upon by Green and Whittier and they stated the deal would not be consummated unless these provisions were inserted in the option. I had a very difficult [56] time in getting Mrs. Hopkins to agree to the terms demanded by Green and Whittier. It was impossible for me to get the option from Mrs. Hopkins unless I reached her through her cousin Benedict, and used his good services. I paid Benedict the sum of $125,000.00, for his assistance in getting Mrs. Hopkins to give the option as requested. I also paid William Hill, who was agent for Mrs. Hopkins in California, the sum of $35,000.00 and agreed to give him one-fourth of my stock in the Belridge Oil Company for his services in helping me to get the option from Mrs. Hopkins.

In all my negotiations with Whittier and Green looking to the securing of the option, the fact was concealed that I had an option for $20.00 an acre and was selling to them for 33⅓ dollars per acre. In fact, I was asked by each of them how much I was to pay for the land, and I informed them that if they insisted upon knowing the terms of my dealings with Mrs. Hopkins that the deal would be called off.

In all my negotiations with Whittier and Green, incident to the securing of the option, I never at any time let them know what I was paying for the option and they never at any time let me know as

(Testimony of W. J. Hole.)

to the reasons why they were so anxious to secure the option on the property.

Mrs. Hopkins was informed of the fact that I stood to make the difference between $20.00, the price called for in her [57] option to me, and 33⅓ dollars, the price called for in the option of January 5, 1911. Her attorney advised me that she was agreeing to the option on account of her cousin, Harry Benedict, and whatever dealings I had with Benedict were satisfactory.

The negotiations incident to securing the option covered a period of three or four months. I did not pay the $25,000.00 stated in the option to Mrs. Hopkins. Burton E. Green paid that sum to Mrs. Hopkins and if the deal had fallen through, the $25,000 in question was to be returned to Burton E. Green.

After the option contract was signed, sealed and delivered, Green and Whittier told me for the first time as to why they accepted the proposition for the purchase of the land at 33⅓ dollars an acre as soon as I made my offer. They informed me that they had theretofore had a party go over the land, found it had splendid signs of oil, had dug pits, treated the soil with ether and that the signs were excellent for an oil country.

Burton E. Green was known to me to be an experienced oil man and was a man of financial responsibility.

Q. How did you feel, if you did feel any way about this matter, after this thing has been

(Testimony of W. J. Hole.)

signed, sealed and delivered and they had told you what they knew about the property?

A. Well, there was two ways to look at it. I was satisfied with what I was making, yet if I had known what they knew they would never have gotten the property for thirty three and a third dollars an acre.

Q. In other words, if you had known what Green and Whittier and others told you they knew from this exploration which they had kept from you, you would never have sold the property for thirty three and a third dollars an acre? [58]

A. No, indeed.

Q. You say you thought it might be oil land when you first acquired the option. Did you have any definite revelations, indications or definite information that led in that direction?

A. Nothing definite, and yet it lay between the Lost Hills and McKittrick. There was oil on both sides of it.

Q. As I understand it as a general proposition you just took a chance. The option did not cost you anything it might develop something?

A. No, it was more than that. I considered the land valuable and I do still; but for oil, I was taking a chance.

Q. Did you know that a person by the name of Van Slyke had ever gone out on that prop-

erty for anyone and made explorations on it before you turned the property over to Whittier and Green?

A. No, I did not.

When the Belridge Oil Company was organized, I received, as agent, all of the stock of the company, but immediately upon receiving it I turned back to my principals, Green and Whittier, four-fifths of the stock.

Mr. MILLIKEN.—The witness is tendered for cross-examination.

Mr. WILSON.—I have no questions.

(Witness excused.)

Whereupon the following statement was made by counsel for the petitioner:

Mr. MILLIKEN.—Now, with permission of Government counsel I will endeavor, as a part of my testimony, to show representative sales in this region, with the object obviously in view of showing that this property was acquired at a very advantageous price, much below the prevailing market price for such land, even at thirty-three and a third dollars an acre. In endeavoring to obtain such evidence I have been able to secure the secretary of the Associated Oil Company, a very large oil company [59] at that time, and he is here to testify with respect to the purchase of some 24,000 acres of land which the Associated Oil Company purchased in 1910, the year before the Belridge Oil Company acquired this property.

With that in view, and because of the fact that he must return to San Francisco, I would like to produce him now out of line with the ordinary continuity of my case, in order that he may be able to return.

The MEMBER.—What have you to say to that, Mr. Wilson?

Mr. WILSON.—I have no objection.

The MEMBER.—Then you may proceed, Mr. Milliken.

TESTIMONY OF J. P. EDWARDS, FOR PETITIONER.

J. P. Edwards was called as a witness by and on behalf of the petitioner and having been first duly sworn, was examined and testified as follows:

My name is J. P. Edwards. I reside in San Francisco and am secretary of the Associated Oil Company. As secretary of that company I am custodian of the minutes of the corporation from the beginning, custodian of the corporate records and other documents and papers that are in charge of a secretary. I have secured photostat copies of the minutes of the meeting of the Associated Oil Company of September 6, 1910, which evidence that the Associated Oil Company entered into an agreement with Martin and Dudley in September, 1910, to negotiate for the purchase of some 24,000 acres of land with a general description set forth in the minutes. The copy of the minutes shows that

(Testimony of J. P. Edwards.)

the negotiations referred to therein were consummated and I testify that the transaction was closed on that basis. I also identify the checks of the Associated [60] Oil Company which were issued by the Associated Oil Company in payment of the property referred to in the minutes.

Mr. MILLIKEN.—I offer this in evidence now as petitioner's Exhibit No. 2.

Mr. WILSON.—With the understanding that the petitioner expects to further identify the lands described in the document now offered, and thus lay a foundation for showing similarity of location and type of lands to that with which we are here confronted, the respondent offers no objection to the offer.

Mr. MILLIKEN.—I accept the qualifications of counsel for respondent, and there will be other witnesses to identify the specific property as to its location, type, contour and topography, with the object in view of showing its similarity to the property with which we are now concerned.

The MEMBER.—It may be received as the Petitioner's Exhibit 2 with the understanding set out by counsel.

By Mr. MILLIKEN:

Q. I will ask you if the consideration mentioned in the instrument and in the papers which have been introduced as Petitioner's Exhibit 2 fully and truthfully state the considera-

(Testimony of J. P. Edwards.)

tion which the Associated Oil Company paid for the property described in Exhibit No. 2?

A. I would like to answer that with a little amplification. The Associated Oil Company commissioned Martin & Dudley to purchase this land from the Carlton Investment Company at $50 an acre with the understanding that instead of a cash commission the Associated Oil Company would deed back to Martin & Dudley, as their commission, one-fourth of the land they acquired.

Q. Did the Associated Oil Company do so?

A. They deeded one-fourth of all the land back to Dudley & Martin.

Q. That being so, what consideration did the Associated Oil Company pay for the land in question, described in Exhibit 2?

A. The land stands the Associated Oil Company sixty-six and two-thirds dollars per acre. [61]

The MEMBER.—That is after deductions?

The WITNESS.—After returning one-fourth of the land to Martin & Dudley.

The MEMBER.—That is the net cost to them?

The WITNESS.—That is what it stands them, the net cost.

Mr. MILLIKEN.—The witness is tendered for cross-examination.

Mr. WILSON.—I have no questions.

Mr. MILLIKEN.—Can the witness be excused to return to San Francisco?

Mr. WILSON.—The respondent will not call this witness.

(Witness excused.)

TESTIMONY OF WILLIAM G. VAN SLYKE, FOR PETITIONER.

William G. Van Slyke was called as a witness by and on behalf of the petitioner and having been first duly sworn, was examined and testified as follows:

My name is William G. Van Slyke. I reside at the present time at Needles, California. Beginning with the year 1894 and for nearly all of the time since then, I have been engaged in the oil business. I first began as a driller's helper and about 1895 worked as a driller of oil wells. During the period from 1895 to the year 1910 I was engaged either as a driller or as a superintendent of drillers in the Fullerton oil fields, in and around Bakersfield, the Kern River field, the McKittrick field and the Lost Hills field. During a part of the time I was so engaged at these various oil fields, I also made it my business to prospect [62] for oil lands, both for and on my own account as well as for others. In the year 1910, I met one, M. H. Whittier, who was in the oil business and who was a large operator. I knew the Belridge Oil property in 1910

(Testimony of William G. Van Slyke.)

and in 1910 I went over and upon said property. The occasion for first going upon that property was to locate some definite corner stakes along the township lines. Also in the year 1910 I went upon the Belridge Oil property for the purpose of prospecting for oil signs on the surface of the ground. On my first trip to the Belridge property in 1910 I noticed there was what is known as an oil structure and also found oil sands. On my first visit to the property I picked up little, dried-up oil sands that were lying on the surface and on my next trip to the property, I dug holes in the ground, dug part of a trench—a little surface trench and took some samples of the underlying formation and tested them with chloroform and I afterwards caused others to make an oil test of them. I also dug a hole down about fourteen feet deep in the wash and got what is known as black oil sand. It was between June and December of 1910 that I dug a hole down about fourteen feet deep and secured what is known as the black oil sand.

Q. Now what was the general contour of that property as you found it there in 1910?

A. Well, it seemed to be along a ridge, running towards what we would call the strike of it, which would be almost northwest by southeast. The ridge is cut up into rolls so that there is a little low place and then it will be high like that all the way along. It forms a kind of anticline. [63]

(Testimony of William G. Van Slyke.)

When I sunk the shaft to a depth of fourteen feet I found that the overlying formation was a kind of white, chalklike stuff and lower down it was shale and dried-out oil sand. As the hole went down it got into richer sand. It became very black and if I remember correctly I could smell oil in the sands. I tested all of the sands as I went down and found live oil sands. I tested the sands and found them to be live oil sands. After I had dug the shaft and made my investigation, I put planks over the top of the shaft and covered over the planks with sand and dirt and sagebrush so that any one coming along this part of the property would not notice my explorations.

I went to see M. H. Whittier and told him about the sands I had discovered on the property, the outcroppings and of having sunk a fourteen foot shaft and he went with me to see the property and told me to keep my discovery quiet and he would see whether he could get ahold of the land in question. Whittier advised me to keep my discovery secret for fear someone else would interfere with his getting possession of the property. I took no one else upon the property and kept my discovery a secret. It was in December of 1910 that I took Whittier to observe the property and demonstrate to him the discovery which I had made.

Mr. MILLIKEN.—The witness is tendered for cross-examination.

Mr. WILSON.—I have no questions.

(Witness excused.)

TESTIMONY OF BURTON E. GREEN, FOR PETITIONER.

Burton E. Green was called as a witness by and on behalf [64] of the petitioner and having been first duly sworn, was examined and testified as follows:

My name is Burton E. Green. I am now engaged in the oil business and I reside in Beverly Hills, California. I first entered the oil business in the year 1895 at Los Angeles. I had some property at that time in Los Angeles that was adjacent to other oil property and I engaged oil drillers to develop it. In the year 1896 I bought some property near the property that I owned in 1895 and had three wells drilled on that property. I engaged Whittier and O'Donnell to drill the wells on the property which I developed in the years 1895 and 1896. After I had caused about six wells to be drilled in 1895 and 1896 I asked M. H. Whittier if he would not like to associate himself with me and take charge of all drilling operations, for the reason that I wanted to expand and go into the general oil business and the development of oil properties. We formed a partnership for the purpose of drilling and developing oil and selling it.

Our first operation was in the northeastern part of the Los Angeles field. We also operated in the Coalinga oil fields. Our operations in the Coalinga oil fields were on quite a large acreage. We next operated, beginning in the year 1898, in Kern River Country. I bought half a section in fee and se-

(Testimony of Burton E. Green.)

cured a lease on a hundred and sixty acres. We next operated in the McKittrick field where we bought a half interest in a company operating there. This was in the year 1899. [65]

While we were operating in the Kern River field and the McKittrick field we formed the Green-Whittier Oil Company. Our operations in the Kern River Country fields and the Coalinga fields were on a large scale. In the year 1902 the Associated Oil Company was formed. I was one of the three organizers of that company and induced the different individual oil companies to put their properties into the Associated Oil Company. The Associated Oil Company had a capital of forty million dollars.

The occasion for the organization of the Associated Oil Company was that oil production had proceeded very fast and there was an over-production of oil with the consequence that there was but very little market for the production. Oil was selling for from ten cents to fifteen cents a barrel and we united all the smaller companies so we could get a better price and get a larger market for our production.

I was one of the directors and one of the three on the Executive Committee of the Associated Oil Company. I sold out my interest in the Associated Oil Company during the years 1909 and 1910. I sold my interest in the Associated Oil Company for between $500,000.00 and $750,000.00. During the period I was associated with the Associated Oil

(Testimony of Burton E. Green.)

Company that company had probably the largest production group in the State of California. While I was associated with the Associated Oil Company I also operated on my own account in purchasing any advantageous property that I might find and did purchase, during the time of my connection with the Associated Oil Company, leases in the Coalinga field for and on my own account [66]

While I was connected with the Associated Oil Company, I approved sales of oil land and sometimes initiated them.

In the year 1905, I was instrumental in forming and organizing the Amalgamated Oil Company. I was a director in that Company and later its President. The Amalgamated Oil Company operated on a very large scale in the State of California.

I have been instrumental in developing oil fields in what might be called virgin territory or territory that was not proven oil territory. The development in the Kern River Country field was virgin territory. While I was President of Amalgamated Oil Company, I developed the La Habra field, across the valley from the Fullerton oil field, and also on the East side of Wolfskill range which lies just west of Beverly Hills.

In the year 1907 or 1908 I also formed the West Coast Oil Company. I bought a piece of land for the West Coast Oil Company which we paid a half million dollars or more for. I also purchased for the West Coast Oil Company in the year 1909 what

(Testimony of Burton E. Green.)

is known as the Victor Hall property, paying therefor the sum of $500,000.00.

I also organized the Inca Oil Company, purchased the lease for it and negotiated all leasing contracts for it.

In the year 1910 I was familiar with the developments that had occurred in the Lost Hills oil fields and in the McKittrick oil fields, and I had developed part of the McKittrick field and had also bought an interest in a company known as the Union Oil Company of Georgia that owned a number of thousands of acres in the McKittrick field. I was also familiar, in the year 1910, with the Midway oil field. [67]

I was familiar with a large tract of land owned by Mrs. E. B. Hopkins, which lies between McKittrick and Lost Hills. M. H. Whittier came to my office and told me that he had just seen W. J. Hole and Hole had informed him that he had bought the property owned by Mrs. Hopkins. Whittier informed me that one, Van Slyke, had developed oil sand on the property. I went on the Hopkins property with Van Slyke and Whittier. I saw the oil croppings on the property, a trench that had been dug on the south end of a blowout, and confirmed the fact that the outcroppings there were similar to the Lost Hills oil fields on the northeast.

Whittier and myself had had a very close business relationship and we were very careful not to

(Testimony of Burton E. Green.)

divulge the information which we had obtained with respect to the Hopkins property.

Mr. Whittier and I next interviewed Mr. Hole. Hole informed us that he had an option on the 31,000 acres of land of Mrs. Hopkins. I asked him what he would turn it over to us for and he replied thirty three and a third dollars an acre. I informed him if he could properly revamp his option to suit our requirements that we would go into the matter and take the option over. During our negotiations with W. J. Hole we never at any time advised him of the explorations which Van Slyke had made and of the investigation which Whittier and I had made with respect to the Hopkins property, and we did not so inform him of our information until after the option had been secured and the Belridge Oil Company was formed. I paid the $25,000 mentioned in the option of January 5, 1911. I, personally, carried on all negotiations with [68] respect to securing the option and insisted upon the provisions in the option with respect to the right to drill wells upon the property, before we were required to purchase the property. I wanted the entire Hopkins property tied up in an option with the privilege of exploration and developing it, and then if we found oil that we could exercise the option by paying to Mrs. Hopkins the sum of thirty-three and a third dollars per acre.

During all our negotiations with Mrs. Hopkins and Mr. Hole, both Whittier and myself were ex-

(Testimony of Burton E. Green.)

tremely careful not to reveal our information with respect to the property or our reasons for desiring to acquire it. I might have, during the negotiations, revealed the information to some of my confidential associates, such as Michael J. Connell or Frank Buck, who were to be interested in the Belridge Oil Company. Mr. Frank Buck as well as Mr. M. H. Whittier are now dead.

Q. Did you have any trouble getting anybody interested with you, after you told them about it?

A. Whittier had invited Connell in. Frank Buck had been with us in the Associated. He and his wife were visiting me in Los Angeles and I told him that I would like to give him an opportunity to go into this company, that I had a wonderful thing, and he said "Well, Burton, if you want me to go in I will go in" and I said, "Frank, I do not want you to go into it if you do not feel like getting down on your knees and thanking me for the privilege of going in," and he then said he wanted to go in.

Q. In your experience as an oil man over this long period to which your testimony relates, is it usual or unusual to effect an option for the purchase of such a large tract of property as the 31,000 here involved?

A. It was quite an unusual transaction. [69]

The MEMBER.—You mean at that time?

The WITNESS.—Yes.

(Testimony of Burton E. Green.)

Q. Do you know of any other option for the purchase of property that gave you such a long period, that is a year and over if necessary, to explore the property, before you would finally take it, and yet had it tied up under option all that time?

A. No, sir, it was the most favorable option I think I have ever seen. You sometimes get that privilege under a lease, but never under a purchase with a fee simple title.

Q. Was this land particularly fortunate with respect to the type of title that you could get?

A. It was a fee simple title.

Q. There were no Government rights in the matter.

A. No.

Q. No patents that had to be litigated about?

A. No.

Q. It has been your experience, as an oil man, dating as it did, from 1895, and including, as it did, your connection with many large oil companies which you formed or were instrumental in forming, and do you feel, based upon all that experience that you would be qualified if you were consulted, to give a willing purchaser, not compelled to purchase and a willing seller, not compelled to sell, reliable information as to what was the actual cash value, or

(Testimony of Burton E. Green.)

fair market value, of the Belridge Oil property as of January 25, 1911? Do you feel that you could do that?

A. In consideration of the oil croppings we had found and the other oil evidence?

Q. Yes. Taking that into account. Assuming that you knew that and a purchaser came to you and a seller came to you, and you had verified those definite outcroppings on the property, you had seen them and accepted them as a fact, and you knew the locality of the land in 1910, and were familiar with that territory, do you feel that you would be competent to give an opinion as to the cash value or fair market value of that property as of January 25, 1911?

A. I know what I would have been willing to pay for it. [70]

Q. Do you think you would be competent to advise on that?

A. I think I would.

The MEMBER.—You mean——

Mr. MILLIKEN (interrupting).—I want to find out what that land was worth. In other words I will go back a moment.

(By Mr. MILLIKEN.)

Q. Had you made in your mind any sum to which you would have gone per acre, had you been required to do so, to get this option from Hole?

(Testimony of Burton E. Green.)

A. I had it constantly in mind when we were going over this period in completing the revamped option.

Q. How much did you figure that you would give, how high would you go, if you had to?

A. I would have gone as high as a hundred dollars an acre.

Q. Now, based upon your experience and taking into account and assuming all of the known factors, such as Van Slyke's discovery, your own and the verification of M. H. Whittier, and assuming that there was a purchaser willing to purchase, and not compelled to, and a seller willing to sell, but not compelled to, with both in complete possession of all of the facts, and what do you think that property would have brought, its actual cash value or fair market value, on January 25, 1911?

A. I think it would have brought at least $100 an acre.

Q. Mr. Green, do you know of any instances, with respect to stockholders of the Belridge Oil Company, who might have become dissatisfied with their investment and might have had, at some time, a desire to sell their holdings?

A. Yes, sir, we had an instance of that kind.

Q. What was that instance? Relate it, if you will, where it occurred and who was present?

(Testimony of Burton E. Green.)

A. Mr. W. J. Connell, sat in with us in a directors' meeting. He had never been in the oil business before that I knew of. He had some hesitancy about putting up [71] the amount of money that it would cost to develop the property. He talked quite a little about it, and finally M. H. Whittier said that he and Hole had talked it over and they would offer him a half a million dollars for his stock.

Q. Did they offer him a half a million dollars for his stock?

A. They said "We will give you a half a million dollars for your stock in the company."

Q. What did Connell say, if anything?

A. Well, he kind of smiled at that and said, "I will consider that" and he said, "I will just take an option on that," but before the meeting adjourned he said he would refuse to take it.

Q. Now, when this offer was made to him by Hole and Whittier, had oil been discovered on the Belridge Company land?

A. No oil had been discovered in a well.

Q. Well, was it shortly after the incorporation on January 25, 1911?

A. Well, it was while we were putting down the ten mile water line to it and moving rigs and putting up necessary buildings.

(Testimony of Burton E. Green.)

Q. In other words you were going ahead, pursuant to your option, and drilling your first oil well?

A. Yes.

Q. But you had not actually drilled a well and discovered oil?

A. No, sir. We had expended a number of thousands of dollars on the property.

The MEMBER.—Do you know how much stock Mr. Connell held?

The WITNESS.—He had one fifth.

(By Mr. MILLIKEN.)

Q. It has been testified, Mr. Green, that there was 31,000 acres of land in this tract that you got from [72] Emily B. Hopkins, and in your opinion, on January 25, 1911, $100 an acre would have been a fair price for it and represented a fair market value and actual cash value?

A. That is my opinion.

Q. So that if Mrs. Hopkins had gotten what you considered a fair market value or price or actual cash value of the property, she would have gotten $3,100,000 approximately from the property?

A. That is my opinion.

Q. Do you put that as a minimum figure?

A. I put that as a minimum figure, yes.

The MEMBER.—Is that the date of the option?

(Testimony of Burton E. Green.)

Mr. MILLIKEN.—January 25, 1911, the date the Belridge Oil Company acquired it.

The WITNESS.—I will further state that my association with the oil business and knowing what the other companies were doing, that if they had known the facts that we knew about the oil formation we would never have gotten it for a hundred dollars an acre.

Q. You believe that if you were able to get it at thirty three and a third dollars because there was concealed information that you had a right to conceal?

A. Yes, sir, and then Mr. Hole had this property tied up.

Mr. MILLIKEN.—The witness is tendered for cross-examination.

Cross-examination.

That upon cross-examination, the witness testified as follows:

I first became casually acquainted with W. J. Hole in 1906. When I first met him he had an agency for the Pierce Arrow automobile and I bought two cars from him, one for M. H. Whittier [73] and one for myself and I don't remember that I saw Mr. Hole between that time and the year 1910 when I saw him with respect to the Hopkins property. M. H. Whittier was present as well as possibly F. B. Henderson, General Manager for the Associated Oil Company and the Amalgamated

(Testimony of Burton E. Green.)

Oil Company, when I first discussed with M. J. Hole the Hopkins property. I discussed with M. J. Hole the Hopkins property subsequent to the discovery which Van Slyke had made on the property. Mr. Hole advised me that he had bought the Hopkins property and I asked him if he had an option to buy it and he replied that he had. I told him that we were interested in acquiring the property and asked what price he would sell for and he informed me at thirty-three and a third dollars per acre. I informed him that the price was satisfactory if we could work out a proper option to meet the conditions that we wished to operate under.

The option to which I refer was not the option dated January 5, 1911. Hole did not show me the option of May, 1910, and did not tell me what were the terms of the option of May, 1910. Mr. Whittier, myself, Van Slyke and my associates had possession of certain knowledge as a result of Van Slyke's activities which Mr. Hole had no knowledge concerning and which we did not impart to him.

Q. The discoveries and prospecting previously done by Mr. Van Slyke constituted an ace in the hole for you, so to speak.

A. I would call it so.

Q. Had you been out to the Hopkins' place prior to this conference? [74]

A. No. I just had Mr. Whittier's say so in the matter.

Q. You had not talked to Van Slyke?

A. I had not.

(Testimony of Burton E. Green.)

Q. But Whittier had?

A. Yes, sir. Van Slyke worked for me and Whittier for a great many years.

Q. It was known to the three of you but not to any outsiders?

A. It was known to the three of us.

Q. Whittier, yourself and Van Slyke?

A. Yes.

Q. And to nobody else?

A. Nobody else at that time.

Q. Did you request Mr. Hole to show you that first option at that time?

A. No, I did not.

Q. At what time did you reach the conclusion in your mind that the land was worth $100 an acre?

A. Well, before we actually secured it.

Q. Well, what do you mean by saying you secured it?

A. When we had the option signed up.

Q. The second option, the one which has been introduced in evidence?

A. Yes, sir.

Q. And did you offer Mr. Hole $100 an acre for that option?

A. I certainly did not.

Q. You have been in the oil game a great many years, have you not?

A. Quite a number. [75]

Q. What percentage of the so-called outcroppings, which you observed when you finally

(Testimony of Burton E. Green.)

visited the premises of the Hopkins ranch, what percentage of outcroppings and other conditions which you found there resulted, when drilling operations had begun, what percentage resulted in the development of oil fields?

A. Everyone that I approved of, the purchase was successful.

Q. How many in number?

A. There was the Coalinga Field, the McKittrick Field, the Kern River Field, the La Habra Field and the Wolfskill property.

Q. You have limited your answer to your own personal experience. I am asking as a general proposition, and as an expert, what percentage of lands where the same general conditions were found, as were found on the Hopkins ranch, resulting in the development of oil fields?

A. I do not know of any similar outcroppings in my observation, except the Lost Hills field. They are exactly similar.

Q. Then these other four that you have mentioned were not similar?

A. They were of a different character. The others were where the formation came up in the hills.

Q. Now, there had never been so far as you knew it at that time, and by that time I mean in January 5, 1911, so far as you knew at that time, there had never been any exploration or

(Testimony of Burton E. Green.)

drilling or oil development of any kind or nature on the Hopkins property, except this 14 foot excavation and what other trenching Mr. Van Slyke might have done?

A. That is all the development that I knew of.

Q. For oil purposes, it was in every sense of the word virgin territory?

A. Virgin territory.

Q. How did you arrive at this figure of $100 an acre?

A. The Lost Hills territory had opened up about a year before and people had paid as high as a hundred [76] dollars an acre after croppings had been exposed. I know that I offered forty thousand dollars for a section and got there just one day too late, in the Lost Hills development.

Q. How far is this Lost Hills structure from the Hopkins property?

A. Well, from the upper end of the Hopkins property I imagine it is about seven or eight miles.

Q. These sales of a hundred dollars per acre in the Lost Hills Section took place, as so far as you know of your own knowledge, at what point in the development of that section?

A. Right at the first.

Q. Before there were any rigs placed?

A. There had been one oil well drilled, one hole.

Q. There had been one hole drilled? How deep do you know?

A. I do not know the depth. It was not deep as I remember it, rather a shallow hole.

Q. Had drilling operations ceased on that particular hole?

A. The people who had drilled it were inexperienced oil men and they had practically the whole country tied up. There was an immediate rush by the different oil companies to acquire other property from other people that owned property in that vicinity.

Q. I am talking about the hole that had been drilled. What had happened to it? Had drilling operations been abandoned on that one hole, or what had occurred?

A. They made this discovery, and then they negotiated with these other companies to take over the property.

Q. Then they had a discovery well, so to speak, before these sales took place. By the way, didn't you testify that it was unusual to find as much as 31,000 acres of land which could be tied up for oil development at that time?

A. I said in fee simple.

Q. Well, on the 25th of January, 1911, you did not [77] have this property in fee simple, but you had an option did you not?

A. The title was in fee simple.

Q. But the title was in Mrs. Hopkins?

(Testimony of Burton E. Green.)

A. Yes. I mean that the title was in fee simple. Generally you have land with locations on it, government land.

Q. Now, who had this Lost Hills section tied up, as you say?

A. As I understand it Dudley & Martin.

Q. Do you know in what way they had it tied up?

A. No, I do not.

Q. What was the approximate acreage of the section that they had tied up, if you know?

A. I haven't any idea about what the approximate acreage was. It was not in one solid body.

Q. Well, how was it divided?

A. Well, as I understand it part of it was Government land that had been filed on for leases, and some of it was acreage that was some miles away.

Q. You do not have any idea of the aggregate of those holdings?

A. I haven't any idea.

Q. Well, was it as much as 31,000 acres?

A. Oh, they didn't have anything to compare with that in a solid body. As I understand it it was scattered all over within ten miles of there. There was one strip, running nine or ten miles, which was further away from the development or as far away from the development as the Belridge Company was from the development on the south.

(Testimony of Burton E. Green.)

Q. Now you advanced this $25,000, I believe you testified, that was paid for this option on January 25, 1911.

A. Yes, sir. [78]

Q. As a matter of fact you were financially able to do that, and you were able to pay Mr. Hole a hundred dollars an acre at that time, were you not?

A. Well, you don't have that much ready cash.

Q. I mean you had resources which you could have turned over without any difficulty?

A. I undoubtedly could.

Q. But you at no time offered Mr. Hole any such sum?

A. I beg your pardon?

Q. You offered him no such sum as $100 an acre?

A. Why should I?

Q. I don't know. I am asking you if you did?

A. I think that is a foolish question.

The MEMBER.—You may answer, but I think you have already said you did not.

(By Mr. WILSON.)

Q. At any rate you did not offer him a hundred dollars an acre?

A. I did not.

Q. As I understand it, Mr. Green, you are basing your estimate of $100 per acre for the land described in this option on the fact that

(Testimony of Burton E. Green.)

in the Lost Hills section, to which you have referred and described somewhat, you knew of sales that had taken place for a similar amount, namely, $100 an acre?

A. I did not base it on that information entirely. I based it on the information that if any of the large companies had had the information that I had they would have paid a hundred dollars an acre for the land.

Q. But that is necessarily a conclusion, is it not, the cost so far as you knew at the time, none of the so-called big companies knew anything about this information which you had as a result of Mr. Van Slyke's activities: none of the companies knew anything about that? [79]

A. I knew that they did not.

Q. Do you know whether or not any of the so-called big companies, up to that time, had made any attempts to purchase this land from Mrs. Hopkins?

A. I know that the other companies had had scouts over the property but they never discovered any indications of oil anywhere on it.

Q. Do you know of your own knowledge of any company that had made any attempt up to that time to secure a lease from Mrs. Hopkins, for oil purposes?

A. I do not know that there was.

(Testimony of Burton E. Green.)

Q. Then why do you say that one of the reasons that you put a figure of $100 an acre was because that is what you think the big companies would have paid?

A. For the very reason that I have stated. They didn't have any knowledge that there was any oil indications on the property.

Q. What you mean is that those companies that had the knowledge that you had would have paid a hundred dollars?

A. That is what I mean.

Q. And what is the basis for your statement in that particular?

A. I have been associated with large oil companies both the Union and the Associated and I know that if it had been offered to them with that information they would have snapped it up.

Q. If you had been an officer of one of the big companies at that time, and you had come into the possession of this knowledge, do I understand from your testimony that you, as a representative of that company, would have made some attempt to secure the property at that figure?

A. I would have secured it at the best figure I could, and I would have gone to that price if necessary.

Q. Now, when this option was actually secured from Mrs. Hopkins, how did you hap-

(Testimony of Burton E. Green.)

pen to know that there was an option between her and Mr. Hole?

A. I do not understand you. [80]

Q. The option which has been introduced in evidence here is between Emily B. Hopkins and W. J. Hole, and you advanced the $25,000 for that option. Why was the option, if you know, between Emily B. Hopkins and Hole rather than Emily B. Hopkins and yourself?

A. Mr. Hole had this first option. I made a contract with Mr. Hole that this option should be taken from my account and be turned over to me when it was finally made. That is the reason I put up the $25,000.

Q. Was that contract reduced to writing?

A. I have a copy of it.

Q. You have it here?

A. Yes.

Q. May I see it, please?

A. Certainly.

Redirect Examination.

Prior to acquiring the option dated January 5, 1911, I personally had been on the Hopkins property and had verified the statements of Whittier with respect to the oil indications. Shortly after oil had been discovered on the Hopkins property we gave an option for the purchase thereof at twelve million dollars.

(Testimony of Burton E. Green.)

It was the practice in California in 1911 to buy prospective oil land—that is the way the oil industry has grown and that is the reason we secured an option on the Hopkins property, because we believed it to be good prospective oil land.

I cannot name the person who purchased or sold the property in Lost Hills for $100 per acre. It was the talk at the time that property sold from $60.00 to $100.00 per acre and some at higher figures. The property to which I have referred was not along the strike. It was off the strike—that is from where the first oil was discovered. [81]

The MEMBER.—What do you mean by "strike"?

The WITNESS.—There is an anticline.

The property in question was off the strike or away from where the first well was found in the Lost Hills section. The property in question was east of the strike. The property that was sold east of the strike was merely prospective oil land.

Q. Well was this $100 an acre price that you have mentioned in good territory with respect to the strike?

A. Not in my opinion, no, and it proved not to be.

Mrs. Hopkins requested that we put up $10,000.00 before preliminary negotiations with respect to the option were undertaken, to show our good faith and after the option was signed I paid the additional sum of $15,000.00, making in all $25,000.00.

(Testimony of Burton E. Green.)

Q. Now Mr. Green your opinion of what a willing purchaser, not compelled to purchase, and a willing seller, not compelled to sell, would have paid for this Belridge territory in January, 1911, is based upon what?

A. It is based upon the large tract of land between the two fields, with the oil showings that it had.

Q. And in giving that opinion you have taken into consideration your whole experience since 1895?

A. Oh, yes, or I would not have been able to.

Q. And you are making the valuation as a practical oil man?

A. Yes, sir.

Q. And what your company would have paid under similar conditions and circumstances?

A. Yes, sir.

Q. What you would have forced anybody to pay?

A. Yes.

Q. And what you would have paid yourself if you had had to pay it? [82]

A. Yes.

Q. You only paid thirty-three and a third dollars an acre for it?

A. Yes.

Q. So that you considered the difference between thirty-three and a third dollars an

(Testimony of Burton E. Green.)

acre and a hundred dollars an acre as an extreme bargain, is that correct?

A. Oh, yes, we knew we had an extreme bargain.

Recross Examination.

The option agreement of January 5, 1911, provided that W. J. Hole was to pay, after the option was exercised, thirty-three and a third dollars per acre. Hole was my agent in handling the option. I am not mentioned in the option agreement but I had a contract with Hole whereby he was acting for me and all negotiations with respect to the option were dictated by me. I was getting the option for the benefit of myself, Whittier and the other people who were subsequently to become the stockholders of the Belridge Oil Company, and in the option agreement provision is made whereby the option might be assigned to a corporation and it was definitely understood that this corporation should be Belridge Oil Company.

TESTIMONY OF MICHAEL J. CONNELL, FOR PETITIONER.

Michael J. Connell was called as a witness by and on behalf of the petitioner and having been first duly sworn, was examined and testified as follows: [83]

(Testimony of Michael J. Connell.)

My name is Michael J. Connell. I reside at Los Angeles, California. I became interested in the Belridge Oil Company at the time of its incorporation on January 25, 1911.

In the latter part of 1910 M. H. Whittier came to see me and told me about a section of land up in the Elk Hills district that was owned by Mrs. E. B. Hopkins and that he was going to get an option on the property in question; that he had had a man who was experienced in oil work go over the property and had received a very favorable report and that he, himself, had checked up the land and examined the property and was satisfied on the question that the property contained oil and could be developed into valuable oil property. He stated that some of his friends were going in with him on the venture, asked me to join with him and I agreed to do so. M. H. Whittier and myself had a very confidential relationship for a long period of time.

At one of the first meetings of the Belridge Oil Company, I made inquiry as to how the property was to be developed, what the overhead would be and if the development was going to be carried along broad and extravagant lines, because if it was to be so developed I might be compelled to sell my interest. M. H. Whittier thereupon asked me what I would take for my interest and I made no answer. M. H. Whittier stated, "I will pay you $500,000.00 for your interest," and I changed the conversation

(Testimony of Michael J. Connell.)

and discussed the question of sale no further. [84]

Q. Is it or is it not a fact that Mr. Whittier made you a definite offer of $500,000?

A. He made this offer at that time.

Q. Was this before or after oil wells had been discovered on the property?

A. Before we started development.

Cross-examination.

Q. To what extent, Mr. Connell, were you familiar with the property covered by the option which has been introduced in evidence here, at the time of this offer made to you by Mr. Whittier?

A. Mr. Whittier explained to me, and explained in some detail, on what he based his value of the property.

At the time Whittier made his offer to me I had not been over the property and had not seen the property. My reason for declining the offer was that I felt the property had much more value and I depended largely upon Mr. Whittier's statement to me and I was willing to take the gamble.

Redirect Examination.

In 1910 I did not pretend to be an oil man although I had lost $400,000 or $500,000 dealing in oil. Whittier told me about all the different indications for oil on the Hopkins property before the corporation was organized,—and before I agreed

(Testimony of Michael J. Connell.)
to take stock in the corporation. I took one-fifth of the stock of the corporation. [85]

(Testimony of F. B. Sutton.)

TESTIMONY OF F. B. SUTTON, FOR PETITIONER.

F. B. Sutton was called as a witness by and on behalf of the petitioner and having been first duly sworn, was examined and testified as follows:

My name is F. B. Sutton. I reside in Los Angeles, California, and am employed by the Belridge Oil Company as well as other corporations. I am now secretary of the Belridge Oil Company and as such am general custodian of the records and books of the Belridge Oil Company.

I was employed by Burton E. Green during the month of January, 1911, and he instructed me to look after the matter of the incorporation of the Belridge Oil Company. He advised me that he wanted the fact of its incorporation kept very secret; that he did not want any information to get out until they had the corporation papers filed and the organization completed, and the option purchased and in the hands of the corporation. I followed his instructions in all respects. I took five clerks in the office and named them as the incorporators of the company in my effort to keep the organization of the corporation secret. If the names

(Testimony of F. B. Sutton.)

of Green and Whittier had appeared as organizers of the corporation, there would have been inquiries as to what they were going to do. I have with me the original minutes of the Belridge Oil Company which show the acquisition of the option dated January 5, 1911. The minutes of the first meeting are dated January 25, 1911. [86]

Whereupon there was then offered and received in evidence petitioner's Exhibit No. 3, a copy of which is attached hereto and by this reference made a part of this statement of evidence. Said Exhibit 3 is the minutes of the Belridge Oil Company dated January 25, 1911, which the witness Sutton has identified.

As Secretary of the Belridge Oil Company, I have the journals showing the opening entries covering the original issue of stock to the Belridge Oil Company, and I can testify that the stock of the Belridge Oil Company was actually issued pursuant to such original journal entry.

The F. B. Henderson therein referred to was at that time General Manager of the Amalgamated Oil Company and was going to be a sort of General Manager of the Belridge Oil Company, but was later taken to San Francisco.

Whereupon there was then offered and received in evidence petitioner's Exhibit No. 4, a copy of which is attached hereto and by this reference made a part of this statement of evidence. Said Exhibit 4 is the original journal entry which was identified by witness Sutton.

(Testimony of F. B. Sutton.)

I also have obtained from the original records of the Belridge Oil Company, the log of the first two wells which were drilled by the Belridge Oil Company.

Mr. MILLIKEN.—I would like to offer the logs of the first three wells drilled by the Belridge Oil Company after they acquired the property.

Mr. WILSON.—I believe the offer is subject to the objection that it is immaterial. It appears from the [87] offered document that the drilling operations to which they refer were begun in each instance at a date subsequent to January, 1911. Now what the production may have been from this property, or any part thereof, is wholly immaterial. We are not concerned with the amount of oil, or the fact that any oil may have been taken from this property or premises subsequent to the date of incorporation of the Belridge Oil Company which, as I recall, was January 25, 1911. The sole issue here is the value to the petitioner, or the fair market value, of the property covered by and included in the option at or about the date of the option. I can see no relevancy or connection between the issue here presented for determination and the contents of the document now offered, and my objection is based on the ground of immateriality.

Mr. MILLIKEN.—I might state, in reply to counsel's statement, that my purpose in offer-

(Testimony of F. B. Sutton.)

ing these oil logs is this: The evidence will show that the first oil well was drilled within three hundred feet of the discovery made by Van Slyke. It is offered for the very definite purpose of, in effect, corroborating the fact that within three hundred feet of where these men found oil indications, oil was found, and they found it within sixty days after they started, and at a ridiculously low depth, so good was the prospect and so valuable was the lease. I might say that if they had drilled an oil well within sixty days afterwards and it had turned out to be a dry hole, was nothing there, the respondent might have a different viewpoint about the introduction of the log from the wells. He would probably be interested in saying "Well, we want to show what these people did within six days," and I want to show that after these indications were found by Green, Whittier and Van Slyke that a well was drilled within three hundred feet of that place.

The MEMBER.—When were those wells started?

Mr. MILLIKEN.—It shows from the logs exactly when they were started. The first well was started March the 11th, 1911, and the well was completed April 21, 1911. The second well was started March 18, 1911, and completed April 7, 1911.

The MEMBER.—Have you a third one there?

(Testimony of F. B. Sutton.)

Mr. MILLIKEN.—No, just two. It also shows foot by foot as when they went down exactly what the structure was that they found and exactly what kind of earth they went through. It shows the geological formations. I think it is pertinent in corroboration. [88]

The MEMBER.—Do the logs show anything with reference to the output of the wells?

Mr. MILLIKEN.—Yes.

The MEMBER.—Are you offering them for that?

Mr. MILLIKEN.—No. I am offering them for the very limited and very definite purpose of corroboration, showing that within a very few days after they got this property that they did what they said they were going to do, that they did it where they said they were going to do it and that they found it there.

The MEMBER.—I am very much impressed, Mr. Wilson, with the thought that this is pretty close to being a part of the res gestae, if not actually a part, so far as the outward indications of the land at the time are concerned. Is that your thought, Mr. Milliken?

Mr. MILLIKEN.—Yes.

The MEMBER.—I will receive the exhibits for the very limited purpose for which they are being offered.

Mr. MILLIKEN.—I specifically do not offer them to prove value. I only offer them for

(Testimony of F. B. Sutton.)

your Honor's information in corroboration of the things that happened right about that same time.

The MEMBER.—You are not offering them for the purpose of showing what the output of these wells was, if any?

Mr. MILLIKEN.—No, sir.

The MEMBER.—Then they will be received for the limited purpose as stated.

Mr. WILSON.—I note an exception, if I may.

The MEMBER.—The exception is granted.

Mr. MILLIKEN.—Will there be objection to substituting a carbon copy?

Mr. WILSON.—No.

The MEMBER.—The right is reserved to permit photographic copies?

Mr. WILSON.—Yes. [89]

The MEMBER.—The right is reserved to withdraw these and substitute photographic copies therefor and they may be received as Petitioner's Exhibit No. 5.

Mr. MILLIKEN.—The witness is tendered for cross-examination.

Mr. WILSON.—I have no questions.

TESTIMONY OF WILLIAM G. VAN SLYKE.

William G. Van Slyke was recalled as a witness by and on behalf of petitioner and having been previously duly sworn was examined and testified as follows:

After the Belridge Oil Company was incorporated, I was employed as superintendent and had charge of drilling its first oil wells. The first oil well was drilled about three hundred feet east of the place where I originally sunk my shaft for the purpose of exploring the property.

Mr. MILLIKEN.—The witness is tendered for cross-examination.

Mr. WILSON.—No questions.

The MEMBER.—How far was the second well drilled?

Mr. MILLIKEN.—Mr. Van Slyke will probably know.

The WITNESS.—About a quarter of a mile northwest of where I sunk the shaft.

The Belridge oil lands have proven to be very valuable oil territory.

TESTIMONY OF WITNESS HARRY R. JOHNSON, FOR PETITIONER.

Harry R. Johnson was called as a witness by and on behalf of petitioner, and having been first duly sworn, was examined and testified as follows: [90]

(Testimony of Harry R. Johnson.)

My name is Harry R. Johnson. My occupation is that of a consulting petroleum geologist. I received my training in a high school in Washington, D. C., and then as temporary assistant to members of the United States Geological Survey, both in the United States Geological Survey in Washington and in the field. I graduated from Leland Stanford University. I made, while in the employ of the United States Government, general geological map examination of the mines in the Silver City district of Idaho, being a study of the structure of mountain building forces in the Snake River Valley region and a study of the sedimentary formations occurring in parts of that region. I have also made geological surveys in the employ of the United States Government to determine whether land was mineral or non-mineral bearing land.

Upon graduating from Leland Stanford, I majored in geology. As an employee of the United States Government, I also instituted an investigation of the water resources of the United States, and particularly as same related to the San Joaquin Valley and from where the San Joaquin River breaks out of the Coast Range toward San Francisco Bay.

I also assisted in connection with the preparation of a geological survey bulletin covering the years 1906 and 1907 with respect to the then existing development in the Santa Maria oil region in California. In 1906 the Santa Maria Valley in Cali-

(Testimony of Harry R. Johnson.)

fornia was much in the public eye inasmuch as it was in the development stage. My work in the Santa Maria district and in [91] the Coalinga oil field district was entirely concerned with the study of the structure and formation of the oil land and whether given lands were oil lands or non-oil lands.

While employed by the United States Government, I assisted in the preparation of Government Bulletin No. 317 with respect to the Santa Maria oil fields.

During 1907 and 1908, while in the employ of the United States Government, I assisted in an extensive survey concerning the oil bearing lands in the Coalinga region and the Cold Hills region, and north to the McKittrick and Temblar Range region, and, in fact, took into consideration in our report the oil bearing region in and around McKittrick, the Midway Field, the Elk Hills region, the Taft District and the then called Spellacy Hill, and the Maricopa Field. This report is referred to as Bulletin 406 of the United States Geological Survey. This book was published by the Government printing office in Washington, D. C., during the year 1910, and is an official publication of the United States Government respecting the oil lands in the fields and regions which I have mentioned.

In 1910 and 1911 I was acquainted with what is known as the Belridge Oil field, or the property belonging to Mrs. E. B. Hopkins, in Kern County, California, comprising some 31,000 acres. The

(Testimony of Harry R. Johnson.)

closest oil production to the Belridge or Hopkins property, prior to January 25, 1911, was the Temblar Range field which was some five or six miles due South of the Southerly portion of the Hopkins property. The Lost Hills field, or the producing portion, [92] was between five and six miles north of the northerly limits of the Hopkins property. The McKittrick property in the northerly portion was about six miles south of the southerly portion of the Hopkins property. There was a decided similarity between the Lost Hills area and the Belridge or Hopkins property. The Lost Hills area is one which seen from the Southwest is almost indistinguishable from the general slope of the west side of the San Joaquin Valley. As one looks across to the Lost Hills from the foothills of the Temblar Range, which are distant some six or eight miles, the hills become more and more visible, and as one passes down toward the northeast of Lost Hills and turns around and looks back, the ridge of hills is quite evident, far more evident from the northeast side than on the southwest. In the same way, the range of hills which exists in the Belridge District is more clearly visible from the northeast than it is from the southwest, particularly from points high up in the foothills of the Temblar Range. As one looks northwesterly across the plain he would hardly know that there were any hills in the vicinity of Belridge at all. Looking at plate one, which is the larger of the two maps——

(Testimony of Harry R. Johnson.)

The MEMBER.—Are you going to offer that?

Mr. MILLIKEN.—Yes. I will ask that that plate one be marked as Exhibit next in order.

Mr. WILSON.—I would like to know the purpose of it.

Mr. MILLIKEN.—The purpose of the map is to show the relationship between the Belridge Oil Field and other fields at that time in that general region and to show the geological structure which existed in 1908, 1910 and 1911.

[93]

The MEMBER.—You may mark it for identification Mr. Clerk.

Mr. MILLIKEN.—I offer it in evidence.

The MEMBER.—Did you prepare that map?

The WITNESS.—Yes.

The MEMBER.—Under your supervision?

The WITNESS.—It is prepared both under my supervision and by my personal work on it.

Mr. MILLIKEN.—I offer it as—in evidence as the exhibit next in order.

The MEMBER.—It will be Petitioner's Exhibit 6.

Mr. WILSON.—It will be objected to by the respondent until and unless it can be shown that parties to the option agreement were cognizant of all the facts which this witness is now testifying about. This witness is a totally disinterested party and is not interested

(Testimony of Harry R. Johnson.)

at all in the acquisition of the option agreement, and in the absence of any testimony showing any interest on his part the matter is immaterial. We are only interested in the value of certain land here, to-wit, the fair market value of the Hopkins Ranch at a certain time fixed in the year 1911. Now unless the parties who were interested in the acquisition of the option agreement were cognizant of the matters which this witness determines as a result of his investigations and examinations, it is objectionable. I object to it in the absence of any showing that the parties interested in this option agreement knew anything about it, and because these exhibits cannot be material. To illustrate more definitely the point I am trying to make, if a certain piece of real estate had a fair market value on March 1, 1913, we will say, and some time long prior to that date someone had put a lot of buried treasure under the ground, and someone knew that these people were buying and selling that property as of March 1, 1913 and that they did not know anything about the treasure, certainly you would not say that the value of the treasure in the ground could enter into the fair market value as of March 1, 1913, if that fact were unknown to the purchasers and sellers of the property. There is not any connection unless, I say, it can be shown that the witnesses who testify here today, these offi-

(Testimony of Harry R. Johnson.)

cers of the Belridge Oil Company, and the people who are interested on the other side, namely, Mrs. Hopkins and her representative—unless it can be shown that those people know all these facts, when it is wholly immaterial. [94]

Mr. MILLIKEN.—I have brought before your Honor all of the people connected with the Belridge Oil Company who are now living. I am afraid my friend forgets some of the testimony that was adduced this morning. Mr. Green testified that before he endeavored to secure this option he had been in the McKittrick Field and knew about it and knew about the Lost Hills Field and about some sale that had been made there. He brought out the fact that he had been in the Midway Field and brought out the fact that he was familiar with this whole area. He brought out that one of the controlling elements in the acquisition of property was the fact of its situation with respect to these other fields about which Mr. Johnson is now attempting to testify. In addition to that Mr. Van Slyke has testified that he was in the McKittrick Field in 1909 and 1910, that he had been in the Midway Field and been in the Lost Hills Field. Frankly, my purpose in Mr. Johnson's testimony is this: I have shown by Mr. Green, from the business man's standpoint, what a prudent business man

(Testimony of Harry R. Johnson.)

would have done under the circumstances. I want to show by Mr. Johnson, a competent geologist and expert, who was going back and forth from these various fields, and who published responsible reports for the Government on all of these fields in those years, and who is particularly well qualified to testify, to show your Honor the situation from the technical standpoint. I will grant that if Mr. Green, Mr. Whittier, Mr. Hole and Mr. Van Slyke had not known anything about all of these properties contiguous, but had just said we are ready to take the property, that it would not be material; but I have laid the foundation by showing that they were familiar with all these fields, just the same as Mr. Johnson is.

The MEMBER.—We will ask the clerk to mark the exhibits for identification for the present. I want to hear the rest of Mr. Johnson's testimony about the map, and then I will rule on the question of admission.

(By Mr. MILLIKEN.)

Q. Tell us what that map is?

A. The map is the culmination of three United States Geological Survey topographical quadrangles, arranged in such a way as to give continuity of effect to the territory covered by the map. One of these quadrangles, the Cholame quadrangle——

(Testimony of Harry R. Johnson.)

Q. I do not desire that minute description of it. Does this map show the Lost Hills Field?

A. Yes, sir. [95]

Q. Does it show the McKittrick Field?

A. Yes, sir.

Q. Does it show the Midway Field?

A. A portion of the Midway Field.

Q. Does it show the Belridge property?

A. Yes, sir.

The MEMBER.—Is that the Belridge property in blue?

The WITNESS.—The area in light blue is the 30,000 acres of Mrs. Hopkins, the Belridge property.

The MEMBER.—You have a key to that map?

A. Yes.

(By Mr. MILLIKEN.)

Q. Read the key, please.

A. Sheet map of geologic and structural data as of 1908 to 1911. Belridge holdings as shown in blue. The blue line surrounding a portion of the area represents miles of productive oil territory as determined by the map, from United States Geological Survey Bulletin 406, by Arnold and Johnson. The line in red with the cross arrows represents an anticline actual and probable; the line in red, partly solid, partly dashed and partly dotted with

(Testimony of Harry R. Johnson.)

arrows, represents the syncline, actual and probable areas; the spots in bright green oil and gas showings; area in yellow producing oil area as of 1911, and so forth.

Mr. MILLIKEN.—With that identification I renew my offer as an exhibit next in order.

The MEMBER.—You say this map was made as of 1908 to 1911?

The WITNESS.—Yes, based upon my own work in that district at that time.

Mr. MILLIKEN.—I offer it as petitioner's exhibit next in order.

The MEMBER.—Do you persist in your objection?

Mr. WILSON.—The objection is renewed on the grounds heretofore stated. [96]

The MEMBER.—The map will be received in evidence.

Mr. WILSON.—I note an exception, if your Honor please.

The MEMBER.—Exception granted.

There was then offered and received in evidence as petitioner's Exhibit 6, a copy of which is attached hereto and by this reference made a part of this statement of evidence. Said Exhibit 6 is a map prepared by and under the supervision of witness Johnson and shows the geologic and structural data as of 1908 and 1911 in the Belridge field.

I resigned from the United States Geological Survey in 1909 when I had completed the preparation

(Testimony of Harry R. Johnson.)

of Bulletin 406 of the United States Geological Survey. After my resignation from the United States Geological Survey, I immediately entered private practice, opening an office in Los Angeles. My practice consisted of geological examination and reports upon producing and prospective oil area, with approximate estimates of oil contents of the area and judgment as to the value of the lands investigated, both relatively and in dollars and cents. Subsequent to 1910, it was a part of my business to advise prospective purchasers as to what, in my opinion, as a geologist, they should pay for prospective oil lands, or what they would be justified in paying. It was a part of my duties, and I held myself as a person competent to advise people what they should pay for lands based upon known geological information, and I did so.

I was employed by people subsequent to 1910 for the purpose just indicated and clients during the period from 1910 not only bought prospective oil lands but sold prospective oil lands based upon my recommendation of the value in the premises. [97]

I have been in this Court-room and have heard the testimony of Mr. Van Slyke as to the discovery that he made, the shaft that he sunk and what he found on the Hopkins property which he reported to Mr. Whittier. I had been told before this case was called for hearing of the discovery that Mr. Van Slyke had made. Prior to testifying here today, I made a visit to the Belridge Oil property and

(Testimony of Harry R. Johnson.)

corroborated for myself the location of the shaft as sunk by Mr. Van Slyke.

Q. And did you, at the request of the petitioner in this case, visit the Belridge Oil Property ascertaining for yourself, in company with Mr. Van Slyke the location of the shaft he said he sunk in 1910?

A. I visited the property which he referred to in his testimony, and found conditions as he had said they would be found, with one exception. The shaft that had been put down so many years ago was in a bottom of a gulch, at the crossing of an old road, that region is subject to cloudbursts, the material in the district is rather loose, uncemented, the courses of channel streams change very rapidly, and at the point where Mr. Van Slyke said that he put down his shaft, right in the bottom of the gulch, the material had come down and completely filled up to the level of the valley floor again. There was, however, a depression two or three feet deep in the bottom of the stream where, as near as Mr. Van Slyke could remember, the position of the shaft was. With that one exception I corroborated every point that Mr. Van Slyke stated that he found.

Q. Is it a correct statement to make that you corroborated, in material respects, what Mr. Van Slyke said in his testimony?

A. Yes, sir.

(Testimony of Harry R. Johnson.)

The geology and contour of the general country of the Belridge Oil property or the Hopkins property has not changed since 1910—no more than just a few inches of silt that might be deposited along a stream course, by filling in,—but the condition is just the same as it was in 1910, the oil signs just the same and the contour of the surface just the same. [98]

Q. Now, is it improbable, or is it a well founded judgment, where a practical oil man discovers what Mr. Van Slyke has testified that he discovered, to come to the conclusion that that represented valuable oil land?

A. It certainly was the most natural thing and an almost inevitable conclusion. That it was oil land, especially in the light of the experience that he would have had in that same sweep of country, from Sunset north and westward to Coalinga, during the period 1910 and 1911 when a great deal of development was going on.

Q. In other words, based upon experience with surrounding and contiguous territory, and based upon the definite testimony of Van Slyke as to what he found, you say it would represent a most natural, consistent and resultant opinion, that that sort of opinion would naturally be formed, that this was valuable oil land?

A. Yes, sir, and he would have been a poor operator if he had not.

(Testimony of Harry R. Johnson.)

While recently at the Belridge oil field, I obtained specimens and samples of the geological formation on the Belridge oil field, made tests and absolutely confirmed the accuracy of the reports made by Mr. Van Slyke to Whittier as to what he found on the test through analysis. I made my visit to the Belridge oil property for this purpose some two weeks ago.

Q. From a geological standpoint, the things that you found a week ago, near the point where he said he sunk his shaft, were the same things that were there in 1910 when he sunk his shaft —I mean the structural formation and everything were the same, that would give an oil man an indication that there was prospective oil there. Is that true?

A. They were identical.

Q. Now, as a competent geologist, as a person who advised people in 1910, and in the second place taking into account and assuming the location of the structures reported by Mr. Van Slyke, and what in your opinion would a person have been authorized to pay, a person who is a willing purchaser and not compelled to purchase, to a willing seller, not compelled to sell, on January 25, 1911, a person being in possession of the information in possession of which Mr. Green and Mr. Whittier and Mr. Van Slyke were—— [99]

(Testimony of Harry R. Johnson.)

Mr. WILSON.—Just a moment. That is objected to on the ground that this witness has no way of knowing what knowledge these gentlemen had on that date.

Mr. MILLIKEN.—I am asking him to take into account the testimony he has heard by Mr. Green, and the testimony he has heard by Mr. Van Slyke, and his report to Mr. Green and Mr. Whittier.

The MEMBER.—You have heard that testimony?

The WITNESS.—Yes.

The MEMBER.—You have been present here during this trial?

The WITNESS.—Yes.

The MEMBER.—And you have followed the testimony closely?

The WITNESS.—As closely as I could.

The MEMBER.—Then he may answer.

Mr. WILSON.—I desire to note an exception.

(By Mr. MILLIKEN.)

Q. Assuming those things what—would a man have been justified in paying?

A. Very close to three million dollars—two million nine hundred and some odd thousand.

The MEMBER.—How did you arrive at that figure?

(Testimony of Harry R. Johnson.)

The WITNESS.—By the methods used by myself and other geologists at that time in determining values and of prospective territory.

(By Mr. MILLIKEN.)

Q. And, in the position you were in 1910, holding yourself out as a person that was competent to advise people, if a would be purchaser had come to you, in your capacity as a consulting petroleum geologist, and had told you the definite verifications that they had, plus your own intimate knowledge of the country, its contour and topography, you would have told them that they would have been justified in paying approx- [100] imately two million nine hundred thousand dollars for the property?

A. Yes, sir, for the thirty odd thousand acres of the Hopkins property.

Mr. MILLIKEN.—The witness is tendered for cross-examination.

Cross-examination.

(By Mr. WILSON.)

Q. The value you have just stated is one which you testify you arrived at by methods such as were used by yourself and other geologists, and when you say "yourself" you mean in the capacity of a geologist?

A. I mean in the capacity of a geologist familiar with the then methods of valuing oil

(Testimony of Harry R. Johnson.)

properties in that part of California, both prospective and producing. You can call me a petroleum engineer if you want to, that is a part of the training of a geologist.

Q. And in that particular matter it is a result not only of scientific education but with years of experience in your chosen profession?

A. Yes, plus several years of experience in that portion of the San Joaquin Valley which at that time was very active in the transfer of properties, and the geological conditions there were quite similar so that I had a basis for establishing a mental background of values as expressed in terms of geologic criterions, if I make myself clear.

The MEMBER.—In your opinion, and the estimate you have given, the figure you have given, was a fair market value of this property at that time?

The WITNESS.—That is correct, as of January 25, 1911, prior to the discovery of any oil wells on the property.

(By Mr. MILLIKEN.)

Q. In arriving at that value you have excluded from your mind any subsequent development after January 25, 1911, have you? [101]

A. Absolutely.

Q. You have eliminated from your mind the particular oil discovery that was made upon

(Testimony of Harry R. Johnson.)

the Belridge property and have taken into account only the factors existing on January 25, 1911?

A. That is correct.

Q. And in your opinion the actual cash value, the fair market value, as between a willing purchaser, not compelled to purchase and willing seller not compelled to sell—if you had been advising them on January 25, 1911, you would have recommended that they pay two million nine hundred thousand dollars for the property?

A. For the 30,000 acres of Hopkins property, yes.

By maps which I use I am able to locate the property which the Associated Oil Company purchased in 1910 and referred to in Exhibit 2 in evidence in this case. The property which the Associated Oil Company purchased, as before mentioned, was not in as good prospective oil territory as the Belridge oil property.

A. From what I know of the position of that property as you have described it, I would say it was not in as good territory, and I can give my reasons for that, very briefly.

Q. Do so, please?

A. In my investigation of the general region in December of 1908, in the preparation of Bulletin No. 416, Mr. Arnold and I found that the

(Testimony of Harry R. Johnson.)

evidences of oil in the croppings in the foothills of the district to the southwest of the Lost Hills—and when I say "foothills" I mean the foothills of the Temblar—the evidences of oil were less specific, less definite, that is the oil sands and croppings were less heavily impregnated with oil, that is the oil shales in which they originated, were less heavily impregnated with oil than some of the rocks in the region lying further to the southeast, especially in the region around Gould Hills, which represents the nearest foothill territory to the Belridge property. In this Gould Hills area there are very extensive showings of oil sands and oil shales which were part of the basis that I used in [102] determination of value and that is the reason why I considered the property purchased by the Associated Oil Company, lying generally to the northwest of the Hopkins property as less valuable for oil than the lands which the Belridge Company acquired.

All my observations, both those made in 1911 and those made when I visited the property of Belridge Oil Company previous to this hearing, absolutely confirm in every detail the facts which witness Van Slyke reported to Whittier. This applies both to the type and location of the property as well as the analysis of the soil and the discovery which he made. And the same facts are present in the Bel-

(Testimony of Harry R. Johnson.)
ridge property today to confirm these facts and statements as they existed in the year 1910.

TESTIMONY OF W. W. ORCUTT, FOR PETITIONER.

W. W. Orcutt was called as a witness by and on behalf of the petitioner and having been first duly sworn, was examined and testified as follows:

My name is W. W. Orcutt. I am employed as a geologist with the Union Oil Company of California. I graduated from Stanford University in the year 1895 with an A. B. degree and majored in geology while at said University. Subsequent to my graduation and for a period of two years, I was engaged in the general engineering business, particularly hydraulic engineering.

In 1897 I became employed by the Union Oil Company and have been with that Company ever since. I first organized the geological department of the Union Oil Company. Later on I was chief engineer and manager of the geological and land department for the Union Oil Company, and at a later date—[103] its Vice President, and since the year 1897 I have been in charge of the Geological and Land Department of the Union Oil Company.

In the early history of the Union Oil Company, it was a fifty million dollar corporation. It is now a corporation with a capitalization of one hundred

(Testimony of W. W. Orcutt.)

million dollars and has very extensive holdings in the State of California.

I have had a great deal to do with leases which the Union Oil Company has acquired as well as leases which it has purchased on oil properties in the State of California. In 1910 and 1911 I advised the Union Oil Company with respect to the purchase of lands, as to whether they were good or bad.

One week prior to my testimony here today, I visited the Belridge Oil Company property in company with the witness Johnson and witness Van Slyke. I have heard the testimony of both witnesses and at the Belridge oil property I made the same investigations to which witness Johnson has testified and I confirm the statements which the witness Johnson has made in whole with respect to the contour and topography of this land, and what we found at the Belridge oil property to confirm the testimony of witness Van Slyke as to his discovery in 1910.

I was familiar, during the years 1910 and 1911, with the Midway Oil Field, Lost Hills Section, McKittrick Field and with the general fields in and around the Belridge property.

Q. Accepting as a fact that there had been brought to the Union Oil Company in 1910, a definite verification of the explorations made by Mr. Van Slyke, to which he has testified—you heard his testimony, didn't you? [104]

A. I did.

(Testimony of W. W. Orcutt.)

Q. Assuming there was a verification of the facts testified to by Mr. Green and assuming your familiarity with that property during all of the prior years; assuming you were employed in the capacity to advise a responsible corporation with respect to the purchase of oil lands, and what in your opinion would you have recommended that the Union Oil Company pay for this property, or any prospective purchaser not compelled to purchase it from a seller not compelled to sell, and what would you have recommended that they pay for the Belridge Oil property in January of 1911 on January 25th of that year?

A. I would have recommended that two million seven hundred thousand dollars.

Mr. WILSON.—You could not say, of course, that the Union Oil Company would have purchased for that figure?

The WITNESS.—No. I say I should have recommended that and would have done so.

The MEMBER.—In your opinion is that the fair market value of the property as of that date?

The WITNESS.—Yes, it is.

Mr. MILLIKEN.—In your opinion is that the actual cash value as of that date?

The WITNESS.—Yes, sir.

Mr. WILSON.—On what do you base your opinion?

(Testimony of W. W. Orcutt.)

The WITNESS.—There are some things that would influence me in arriving at that conclusion. First of all the similarity of the outcroppings and the structure of this particular area with that of the Lost Hills and with the Buena Vista Field and several other fields throughout Southern California and Central California, the uprising and the extension of that structure for many miles into the Belridge property and made it appear that quite a large proportion of that 31,000 acres would be good oil territory. They had the right structural and geological conditions to make an oil field.

Cross-examination.

(By Mr. WILSON.)

Q. The basis of your opinion consists of your scientific education along the lines of geology and engineering, [105] coupled with a good many years of actual experience in your profession, isn't that true?

A. Yes.

Mr. WILSON.—I do not have any further cross-examination.

Redirect Examination.

In arriving at my estimate of value of the Belridge Oil property or the lands of Mrs. Hopkins on January 25, 1911, I have absolutely closed my mind to what has taken place in these properties subse-

(Testimony of W. W. Orcutt.)

quent to January 25, 1911. And in arriving at the value, I have not only taken into account my special training as a geologist but my knowledge in general of oil properties as well as the general condition of affairs at January 25, 1911.

I am not interested in any way in the outcome of this hearing. In fact, I am the chief geologist and Vice President of the Union Oil Company which is a competitor of the Belridge Oil Company.

The MEMBER.—The value you give is as of January 25, 1911.

The WITNESS.—Yes, sir.

Mr. MILLIKEN.—May it please your Honor, I now request that the restrictions which your Honor imposed and which I accepted, as to Exhibit No. 2 be removed, Exhibit No. 2 to be the minutes of the Associated Oil Company with respect to the purchase of some 24,000 acres of land.

The MEMBER.—Do you now offer the exhibit without the qualification?

Mr. MILLIKEN.—Yes.

The MEMBER.—I remember the offer and the qualification. Do you object to its receipt now, Mr. Wilson? [106]

Mr. WILSON.—Yes. The objection is renewed on the ground that the only manner in which the lands described and included in the document had been compared with the lands covered by the option agreement and involved

(Testimony of W. W. Orcutt.)

in this proceeding, is by a scientific explanation of similarity to the topography and contour. There has been no comparison shown whatever from the standpoint of financial value. There has been no evidence whatever to the value, in purchase and sale, of lands near the 31,000 acres of the Hopkins tract. All we have here is a certain document made up of the minutes of this company of the purchase of some 24,000 acres of land, and that stands alone, except, as I have already stated, for what I would term a scientific comparison, through the medium of scientific terms, without any tying up, so to speak, with value from the standpoint of the layman or individual who were concerned and connected with the transaction involved. I have listened very carefully and I confess I do not recall any testimony whatever, except the testimony by Mr. Johnson relating to a similarity in contour of the land and in topography, and they certainly are not all of the major elements entering into the value of land for any purpose. The objection heretofore made is at this time renewed.

The MEMBER.—Mr. Milliken, will you now state the purpose of your offer?

Mr. MILLIKEN.—The purpose of my offer is to show that before the Belridge Company land was obtained, under option, from Emily B. Hopkins, that there had changed hands at

(Testimony of W. W. Orcutt.)

sixty six and two thirds dollars an acre, land that was not as good as the Belridge Oil Company's land, land that was not more advantageously situated; that is it was purchased before the Belridge property was purchased, while here the Government has restricted us to a value of less than half of what the Associated Oil Company paid over a million dollars for, these 24,000 acres.

The MEMBER.—I remember the testimony. Have you stated your purpose?

Mr. MILLIKEN.—That is my purpose.

The MEMBER.—Just what is your objection, Mr. Wilson?

Mr. WILSON.—I want to offer this further objection, in addition to what I have stated in the record: That the document now offered, is the minutes of a meeting relating to the purchase by the Associated Oil Company of the lands described therein, and attached thereto are photostatic copies of certain checks which admittedly were given in payment of the land. Now there is nothing in the record as to the [107] circumstances attending that sale. There isn't any evidence as to whether or not that was a sale made in the open market or whether it was a forced sale, or no evidence as to the circumstances under which the Associated Company bought it or the sellers sold it. Now, in the absence of evidence tending to show the cir-

(Testimony of W. W. Orcutt.)

cumstances attending the sale how can it properly be used as a comparative? How can the price which was paid be offered to compare with the transaction which we have here? Now if the petitioner expects to use this purchase by the Associated Oil Company as a comparative, then, surely the board and the respondent are entitled to some evidence of the surrounding circumstances, something more than the minutes of a meeting.

The MEMBER.—This morning, when the offer was made, you expressed your position that you had no objection to it provided that it was shown that the land in question was similar and of similar character to the land of the Belridge Oil Company.

Mr. WILSON.—Yes.

The MEMBER.—And it seems to me that the objection that you have now made is not timely, as the witness who was on the stand has apparently left the city.

Mr. MILLIKEN.—I might also make this observation, if you will permit me. I asked the witness if it represented the sole consideration as stated in the minutes, which was given for the property and he answered that it did and then I asked him if it truthfully recorded the entire transaction and he said it did.

The MEMBER.—He also testified that there was some payments made to some firm of

(Testimony of W. W. Orcutt.)

brokers, and he testified as to the net cost of the acreage.

Mr. MILLIKEN.—The objection was as to whether or not they could be connected up and shown to be similar land, and I submit that through the witness Johnson I have connected them up and shown the similarity of the lands.

Mr. WILSON.—If I may say a word at this stage of the proceedings. In the first place the witness this morning was secretary of the company. There was no showing that he was a participant in the sale or anything or that he knew anything about it, except that he testified as to the authenticity of the records. There isn't any dispute that the sale took place, but the point is that the petitioner is here attempting to show the sale of lands which, [108] aside from a scientific explanation given by the one witness Johnson, have not been shown to be comparative or similar too, or to have the approximate value of the lands involved here. The objection I made this morning was on the proposition of showing similarity between the lands involved in the transaction and the lands we have here. The respondent submits at this time that that has not been done. If it is your Honor's view that the respondent cannot at this time offer any further objection to the one offered this morning, it is my understanding that the matter is subject to objection at any

(Testimony of W. W. Orcutt.)

time until it is actually in the record. As I understand it the document had not yet been unqualifiedly introduced into the record, and I think the objections by the respondent are well taken, as I have heretofore stated, and renew them at this time.

The MEMBER.—The reservation which counsel for the respondent made at the time that Exhibit No. 2 was offered this morning in the first instance, and which are now put in the form of an objection—I understand it is now in the form of an objection, and it is overruled. It seems to me that the objection is untimely at this time.

Mr. WILSON.—May the respondent have an exception.

The MEMBER.—Yes.

Mr. WILSON.—The petition filed in this appeal alleges among other facts, the following, appearing in paragraph three: "The taxes in controversy are income profit taxes for the years 1921 to 1923 inclusive are more than $10,000, to-wit: $54,671.65. That allegation is admitted in the respondent's answer.

Referring to the 60 day letter, made the basis of the appeal, and more particularly to the statement attached thereto, on pages 2 and 3, we find deficiencies for the two years 1922 and

(Testimony of W. W. Orcutt.)

1923 in the sums of $4692.89 and $4684.91 respectively.

The MEMBER.—Just a minute, I do not quite follow that.

Mr. WILSON.—That is the 60 day letter.

[109]

The MEMBER.—You have the figure here $4692.89. Is that right?

Mr. MILLIKEN.—That is all admitted in the petitioner's answer.

The MEMBER.—That is for the year 1922?

Mr. WILSON.—For 1922 the proposed deficiency is $4692.89 and the 1923 $4684.91. The respondent at this time moves to amend the answer, as to paragraph three, wherein it is alleged that the taxes in controversy are $54,-671.65.

The MEMBER.—I understand that you are moving to amend the answer?

Mr. WILSON.—Yes, the purpose of the motion being that the testimony here today has been confined to the one issue, which is the year 1921, and therefore any testimony or evidence introduced relating to the adjustments which occasioned the proposed deficiency for 1922 and '23 is not applicable, the petitioner has waived and abandoned any protest or objections to those adjustments of 1922 and '23 and the total amount is therefore not in controversy.

(Testimony of W. W. Orcutt.)

The MEMBER.—As I understand it in the amendment you want to change the figure 54,-000 to another figure?

Mr. WILSON.—I am not seeking to change it, but to deny that that is the correct amount in controversy. The reason I am making this motion is that it is preliminary to a second motion, that the deficiency determined by the commissioner for the year 1922, in the sum of $4689 and the deficiency determined by the commissioner for the year 1923, in the sum of $4684, that they are determined by the board at this time to be the sums therein set out, there being no evidence introduced by the petitioner relating to the adjustments that occasioned this proposed deficiency. In other words the respondent contends that the petitioner has waived that matter and there is no controversy now as to the years 1922 and '23.

The MEMBER.—I will grant your motion to amend your answer, and as to your other motion I will take it under advisement and dispose of it when we dispose of the entire case.

Mr. WILSON.—The respondent rests. [110]

Mr. MILLIKEN.—Counsel for the petitioner desires to respectfully amend the petition to conform to the proof adduced here today. Comes now the petitioner and respectfully moves the board to be allowed to amend its petition filed in this cause as follows:

(Testimony of W. W. Orcutt.)

The respondent further erred in that he refused or failed to allow this petitioner a paid in surplus in accordance with Section 326 of the Revenue Act of 1921 in that the assets, i. e., option paid in for stock had an actual cash value, at the time paid in clearly and substantially in excess of the par value of said stock, in the amount of $671,806.40.

The MEMBER.—What do you say to that motion, Mr. Wilson?

Mr. WILSON.—The resondent has no objection to the motion providing the answer may show the general denial of the allegation of facts therein contained.

The MEMBER.—The motion is granted and the record will show that the respondent has entered a general denial to the amendment to the petition just made.

Mr. MILLIKEN.—Petitioner rests.

The foregoing evidence is all of the material evidence adduced at the hearing before the United States Board of Tax Appeals and same is approved by counsel for petitioner-taxpayer.

LLEWELLYN A. LUCE,
Counsel for Petitioner.

The foregoing is all of the material evidence adduced at the hearing before the United States Board of Tax Appeals and same is approved by the undersigned as attorney for the respondent-Commissioner of Internal Revenue.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue. [111]

The foregoing is all of the material evidence adduced at the hearing and in order that same may be preserved and made a part of the record, this statement of evidence is duly approved and settled this.....day of ....., 1932.

.....,
Member-United States Board
of Tax Appeals.

Approved and ordered filed this 20th day of Dec., 1932.

LOGAN MORRIS,
Member.

[Endorsed]: Filed December 20, 1932. [112]

PETITIONER'S EXHIBIT 1.

AGREEMENT made this 5th day of January in the year one thousand nine hundred and eleven, by and between EMILY B. HOPKINS, of the City and State of New York, party of the first part, and W. J. HOLE, of the City of Los Angeles, State of California, party of the second part.

WITNESSETH:

That the parties hereto each in consideration of the covenants of the other, and of the Dollar ($1.00) to each in hand paid by the other, and other good and valuable considerations, receipt whereof is hereby acknowledged, do covenant and agree to and with each other as follows:

FIRST: The party of the second part agrees to pay to the party of the first part, or her counsel, F. K. Pendleton, on her behalf, on the execution and delivery hereof, the sum of Twenty-five Thousand Dollars ($25,000.) for the right or option to purchase from the said party of the first part at any time before the expiration of one year from the first day of January, 1911, on the terms and at the price hereinafter set forth, all those certain lands in the County of Kern in the State of California, more particularly described as follows:

Sections 25, 26, 27, 28, 29, 30 and 35, and the SW¼ of Section 19, and the S½ of the SE¼ of Section 19, in Twp. 27 South, Rg. 20 east; Sections 28, 29, 30, 31, 32 and 33, and the West ½ of Section 27, and the NW¼ of Section 34 in Twp. 27 South, Rg. 21 East; the North ½ and the North ½ of the South ½ of Section 1; all of Section 2, except the South ½ of the SE¼ thereof; the South half of the SE¼ of Section 12 and Section 13, in Twp. 28 South, Rg. 20 East; Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34 and 35 in Twp. 28

South, Rg. 21 East, M. D. M., containing in all substantially an area of 30,845.96 acres of land, subject to pipe line, telegraph and telephone rights to Producers Transportation Co., and Associated Pipe Line Co., and a lease to Miller and Lux for one year from January 1st, 1911, for grazing purposes and all such rights of way for pipe lines, telephone and telegraph lines, or other rights, as may have been heretofore granted or conveyed by said party of the first part, and now of record in the office of the Recorder of Kern County, California. [113]

In the event of the exercise of said option by said party of the second part, the said sum of Twenty-five Thousand Dollars ($25,000.) paid on the execution hereof as aforesaid shall be applied and allowed on account of the purchase price of said lands, otherwise to belong to said party of the first part absolutely.

Second: The party of the first part hereby agrees on compliance by the party of the second part with all the terms and provisions hereof in the manner and within the times herein specified, and payment of the purchase price as herein provided on thirty days previous notice in writing from said party of the second part to the said counsel of said party of the first part, delivered at his office in the City of New York, of the intention to exercise said option, to sell, transfer, assign and convey to said party of the second part the said lands afore-

said free from any and all liens and encumbrances, except as aforesaid. The deed of conveyance to be in proper form to convey said lands above mentioned and to be prepared by counsel for said party of the first part and delivered to said party of the second part, at the office of F. K. Pendleton, 25 Broad Street, Borough of Manhattan, City of New York, at twelve o'clock noon on the day to be specified in said notice aforesaid, or at such other time and place as may be mutually agreed upon by said counsel and said party of the second part.

THIRD: The purchase price of said property and the terms and conditions of the said option are as follows:

"A". The purchase price is Thirty-three and one-third Dollars ($33\frac{1}{3}$) per acre, viz., the sum of One Million, Twenty-eight Thousand, One Hundred and Ninety-eight and Sixety-seven one-hundredths Dollars ($1,028,198.67) payable as follows: One-tenth at the time of delivery of deed as aforesaid; of said one-tenth the sum of Seventy-seven Thousand Eight Hundred Nine- [114] teen and eighty-six one-hundredths Dollars ($77,819.86) is to be paid in cash, and a credit is to be given to said one-tenth payment in the sum of $25,000, which has heretofore been paid for the option. The balance of said purchase price is to be paid in yearly installments, with interest on the unpaid balance from time to time remaining unpaid at the rate of 5% per annum, from date of delivery of deed, viz.: one-tenth

of said purchase price, i. e., One Hundred and Two thousand, Eight Hundred and Nineteen and eighty-six one hundredths Dollars ($102,819.86), with interest as aforesaid on the first day of January in the year 1913, and on the first days of January each of years 1914 to 1917, inclusive, and one-fifth thereof, viz., Two Hundred and Five Thousand, Six Hundred and Thirty-nine and Seventy-two one-hundredths ($205,639.72) with interest as aforesaid on the first day of January of years 1918 and 1919, respectively. All of said deferred payments to be represented by mortgage notes secured by a purchase money first lien mortgage on the lands herein described, such mortgage to be delivered at the time of delivery of the deed aforesaid, and to be prepared by the counsel aforesaid of said party of the first part, and to contain the usual clauses, including provisions for maturity in case of default in the payment of principal, interest, taxes or other provisions, and also a clause that all oil or gas from said property in excess of the amount used for fuel in the development or operation of said property by second party, and the proceeds or revenue derived from the sale thereof in excess of the amount of money expended by said second party for the improvements or developments placed on said land, shall be applied to the payment of the sums secured to be paid by said mortgage until paid in full, first party agreeing that the amounts so derived shall be applied to the earliest maturing notes of said second party. [115]

And also a clause allowing pre-payment at any time on thirty days notice of the whole or any part of the principal secured to be paid; and also a clause providing that in the event the owners of the property desire to sell any portion of the property covered by said mortgage, the holder of said mortgage will release the premises so sold from the lien thereof, providing the price and terms of sale are satisfactory to said holder, and the purchase money is applied as payment on account of amount secured to be paid by said mortgage.

First party further agrees that should any sums of money derived from the sale of the land as aforesaid be paid to it by second party, first party will apply such payments on the earliest maturing notes of said second party.

"B". The party of the second part shall drill on said lands four proper and suitable wells for the discovery of oil or gas, same to be located on such portions of said property as the said party of the second part may select. The drilling of at least two of such wells shall be commenced as soon after the date hereof as two first-class drilling outfits can be installed on the property, and the necessary water for same provided, and thereafter the second party shall continuously and diligently prosecute the work of drilling on said two wells until oil or gas shall have been found, or until said second party shall decide to abandon the further drilling of such wells.

And second party agrees that within sixty days after completing such first two wells, or the aban-

donment of such two wells, and the withdrawal of the pipe therefrom, if not purchased by first party, to commence the drilling of a second two wells with the same drilling outfits as used on the first two wells, and to prosecute the drilling of the second two wells diligently and continuously, in good faith, until oil or gas shall have been found in said second two wells, and the completion thereof, or [116] until the second party shall decide to abandon further work on said second two wells.

Said second party may drill as many more wells as he may elect within the time specified for the drilling of the said four wells.

All wells drilled, or to be drilled, hereunder shall be drilled in a workmanlike manner for the production of oil or gas, and all care taken and proper methods adopted for the prevention of the entrance of water into any oil bearing formation in accordance with requirements of the statutes of the State of California. In the event of the abandonment of any of the wells drilled hereunder, the party of the first part shall have the right and option for ten days after notice of such abandonment, to purchase the casing in any one, or all, of the wells so abandoned, at the actual cost of such casing at the well site. If first party does not exercise such option within ten days after notice shall have been given to it by second party, the second party shall have the right to remove such casing and all other material from the location of such abandoned well or

wells. In the event of the removal of the casing from an abandoned well, the second party agrees to protect the oil bearing formation from the intrusion of water, in accordance with the statutes of the State of California. In case the party of the first part purchases any of the said casing, then the well where such casing is shall not be injured by said party of the second part in any particular whatsoever.

In the event of the discovery of gas or oil in paying quantities on the property aforesaid, prior to the delivery of deed as hereinbefore mentioned, the second party agrees that all proceeds derived from the sale thereof, in excess of the fuel consumed in the operation and development of this property, shall be the property of and belong to said party of the first part; and said second party further agrees to pay to first party such surplus proceeds; and first party agrees that if second party exercises this option to purchase, said first party will credit [117] second party with the amount of such proceeds on the money first falling due on account of such purchase.

"C": In the event that the first two wells to be drilled, as hereinabove provided, shall prove to be what is known as "dry" wells, and the two additional wells, or either of them, hereinbefore provided for, shall not have been completed by the first day of January, 1912, hereinbefore referred to, the option hereby given to purchase said property on

the terms aforesaid shall be extended until the expiration of thirty days after the finding of oil or gas in the said last two wells and completion of same, or the abandonment of work on the same; provided, that the said party of the second part continuously and diligently prosecutes the drilling of said wells aforesaid with all reasonable speed until oil or gas is found or said wells abandoned; and in the event the time to exercise the option is extended, as in this clause provided, the notes and mortgage securing the same shall be dated as of the date of the exercise of said option and the deferred payments represented thereby shall be extended accordingly.

"D": The party of the first part shall have the right at any time, through agents appointed by her or her counsel aforesaid, to investigate all the work and operations being carried on by said party of the second part on the property covered hereby, and for that purpose shall have free access at all reasonable times to all buildings or premises occupied or used by the said party of the second part, who shall himself or through his representatives afford to the representatives of the said party of the first part, all reasonable opportunity to make thorough examination and investigation of all such work or operations, including the logs of any and all wells drilled, sunk or opened, and any maps or charts of said party of the second part, and to acquire all additional information concerning the same.

And the said party of the second part shall furnish, when so requested, to the counsel of the party of the first part, or his [118] order, a log of any and all wells drilled by second party, and a map or chart on which shall be located the position of such well or wells.

"E". The party of the second part shall have the right, if he so elect, at the time of the exercise of the option by him to purchase the said property as aforesaid, to take title thereto in the name of a corporation to be organized by him for the purpose, which corporation shall execute the notes and mortgage hereinbefore referred to, and the execution thereof by such corporation shall be deemed a compliance with the terms of this agreement.

"F". In the event that the said party of the second part shall not exercise the option to purchase said properties as hereinbefore provided, he shall at the request of the said party of the first part at any time after the expiration of said option, execute in writing an instrument in proper form setting forth that he has not exercised the said option, and releasing each and every right hereunder, such instrument to be prepared by the counsel of the said party of the first part, and to be acknowledged by the said party of the second part in such manner as shall entitle the same to be recorded, and shall be delivered to the said party of the first part, or her counsel aforesaid, in order that the

same may be recorded if desired by said party of the first part.

FOURTH: This agreement shall be binding upon and enure to the benefit of the respective representatives and assigns of the parties hereto.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

Emily B. Hopkins.
By F. K. Pendleton,
Atty. in fact.
W. J. Hole.

IN PRESENCE OF:
Roswell C. Otheman. [119]

State of California,
County of Los Angeles.—ss.

On this 5th day of January in the year nineteen hundred and eleven before me, E. T. STODDARD, a Notary Public in and for said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared W. J. Hole known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] E. T. Stoddard,
Notary Public in and for said County. [120]

State of California,
County of Los Angeles.—ss.

On this 25th day of January in the year nineteen hundred and eleven before me, E. T. STODDARD, a Notary Public in and for said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared W. J. Hole known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] E. T. Stoddard,
Notary Public in and for said County. [121]

ASSIGNMENT.

IN CONSIDERATION of the payment of Ten Dollars ($10.00) and other valuable consideration, the receipt of which is hereby acknowledged, I, W. J. Hole, do hereby sell, transfer and assign to the BELRIDGE OIL COMPANY, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City of Los Angeles, County of Los Angeles, State of California, all of my right, title and interest in and to the foregoing agreement, dated January 5th, 1911, between Emily B. Hopkins and myself, covering all those

certain lands in the County of Kern, State of California, as particularly described in said agreement.

WITNESS my hand this 25th day of January, 1911.

[Seal] W. J. Hole.

Notarial Acknowledgment. [122]

[Page 123] is photostat inserted opposite.

PETITIONER'S EXHIBIT 2.

MINUTES OF SPECIAL MEETING OF BOARD OF DIRECTORS OF ASSOCIATED OIL COMPANY

San Francisco, Cal., September 6, 1910.

Special meeting of the Board of Directors of Associated Oil Company, held at San Francisco, California, on September 6, 1910, pursuant to resolution adopted by the Board of Directors on February 28, 1910.

The meeting convened at eleven o'clock a. m.

Mr. W. F. Herrin, President in the Chair.

Secretary O. Scribner in place.

The Chairman directed the Secretary to call the roll, which disclosed the following:

Present: Directors W. F. Herrin, W. S. Porter, Paul Shoup, F. H. Buck, O. Scribner, John C.

00426

RECORDER OF COMPANY

AGREEMENT.

between

Emily Hopkins,

And

W. J. Hole.

Dated. 5th day of January 1911.

Recorded at Request of

W. E. Van Slyke

JAN 8

at 3 5 min. past 8 4 M.

in Book 26 of Agreements

at page 311

Recorder.

4/1/21

Kirkpatrick, J. A. Chanslor and Rudolph Herold, Jr.

Absent: Directors R. P. Schwerin, Burton E. Green and R. T. Dumble.

The Chairman announced a quorum present, and the meeting ready for the transaction of business.

Thereupon the Secretary read the minutes of meeting of the Board of Directors of Associated Oil Company held on August 2, 1910, appearing on pages 153 to 157, volume 4 of Minutes, which minutes were approved as read.

Thereupon the Chairman submitted report of the Executive Committee of their actions commencing August 2, 1910, and ending August 30, 1910, which report on motion of Director Herold, seconded by Director Buck and unanimously carried, was ordered received and placed on file, and the actions of the Executive Committee as therein set forth ratified, approved and confirmed.

The Assistant General Manager reported that acting under authorization of the Executive Committee, the Associated Oil Company had acquired by assignment dated the 2nd day of September, 1910, a certain contract bearing date July 7, 1910, executed by the Carlton Investment Company and J. D. Martin, B. B. Dudley and E. R. Dudley, covering the sale by said Carlton Investment Company to said Martin et al. of the following described lands, situate in Kern County, State of California, containing 23,962.47 acres, more or less, to wit: [124]

September 6, 1910.

In Township 25 South, Range 19 East, M. D. B. & M.

Section 24: All of;

In Township 25 South, Range 20 East, M. D. B. & M.

Section 14: Southwest quarter and Southwest quarter of Northwest quarter;
Section 18: All of;
Section 22: All of;
Section 24: All of;
Section 26: All of;
Section 28: All of;
Section 30: All of;
Section 32: All of;
Section 34: All of.

In Township 27 South, Range 19 East, M. D. B. & M.

Section 3: All of;
Section 4: All of;
Section 5: All of;
Section 10: All of;
Section 11: All of;
Section 13: All of;
Section 14: All of;
Section 15: All of.

In Township 27 South, Range 20 East, M. D. B. & M.

Section 13: All of;
Section 14: All of;

Section 15: All of;
Section 17: All of;
Section 18: All of;
Section 21: All of;
Section 22: All of;
Section 23: All of;
Section 24: All of;
Section 20: East half.

In Township 27 South, Range 21 East, M. D. B. & M.

Section 13: All of;
Section 14: All of;
Section 17: All of;
Section 18: All of; [125]
Section 19: All of;
Section 20: All of;
Section 21: All of;
Section 23: All of;
Section 24: All of;
Section 7: South half;
Section 8: South half;
Section 12: South half;
Section 9: West half and West half of East half of the Southeast quarter.

That the purchase price of said land was at the rate of Fifty Dollars per acre, aggregating $1,198,-123.50, $2500. of which had been paid by said Martin et al. upon the execution of said contract; that he had agreed with Martin et al. on behalf of the Associated Oil Company, to take an assignment

of said contract and that the Associated Oil Company should assume the benefits and obligations thereof, carrying Martin et al. for an undivided one-fourth interest in and to said lands free of cost or charge to them; that said assignment had been executed by Martin et al. and the Associated Oil Company, and said Martin et al. had executed to the Associated Oil Company a deed covering all of said lands, title to which may be acquired by the Associated Oil Company under and by virtue of the terms and conditions of said contract; that the Vice President and Secretary of the Associated Oil Company had executed to Martin et al. a deed conveying to them an undivided one-fourth interest in and to all the lands to which the Associated Oil Company may acquire title under and by virtue of the terms of said contract made and entered into by and between said Carlton Investment Company, of date July 7, 1910.

Thereupon Director Herold presented and moved the adoption of the following resolution:

> Be It Resolved that the action of the Assistant General Manager in making and entering into said contract as above outlined, and the action of the officers of this corporation in executing, acknowledging and delivering the documents above set forth, be and the same is hereby ratified, approved and confirmed, and adopted as the act and deed of this corporation, and the General Manager, or Assistant General Manager are hereby authorized to fully carry out and perform the terms and conditions of said

contract, and to do [126] all things necessary or incidental thereto, and to make payments only as they fall due, according to the terms and conditions thereof.

Motion to adopt the resolution was seconded and upon being put to a vote was unanimously carried and so declared by the Chair. [127]

San Francisco, California,
May 21, 1930.

I, J. P. Edwards, hereby certify that I am the duly elected, qualified and acting Secretary of the Associated Oil Company, and that the foregoing is a full, true and correct extract from minutes of meeting of Board of Directors of Associated Oil Company, duly called and held on September 6, 1910, at which meeting more than a quorum of the Board of Directors was present and voting in the affirmative.

J. P. EDWARDS,
Secretary,
Associated Oil Cimpany. [128]

March 5, 1912.

Thereupon Director Herold presented and moved the adoption of the following resolution:

WHEREAS, Heretofore, under date of July 7, 1910, J. D. Martin, E. R. Dudley and B. B. Dudley entered into a contract with the Carlton Investment Company for the purchase of certain lands described in said contract and in the

Minutes of September 6, 1910, appearing on pages 158 and following of Vol. 4 of the Minutes of this corporation, and

WHEREAS, Thereafter, on September 2, 1910, said J. D. Martin, B. B. Dudley and E. R. Dudley assigned said contract to this corporation, and

WHEREAS, Thereafter, on the 6th day of September, 1910, this Board authorized the General Manager or Assistant General Manager of this corporation to fully carry out and perform the terms and conditions of said contract and to do all things necessary or incidental thereto, and to make payments only as they fell due according to the terms and conditions thereof, as appears from pages 158 and following of said Minute Book, and [129]

WHEREAS, Payments have heretofore been made on said contract, according to the terms and conditions thereof, as follows:

1910.

July 7	By Martin & Dudley	$ 2500
Aug. 6	By Associated Oil Company	25000
Sept. 1	" " " "	12500
Oct. 1	" " " "	12500
Nov. 1	" " " "	12500
Dec. 1	" " " "	10000
Dec. 14	" " " "	75000
		$150000

AND WHEREAS, Said contract provided that the balance of the purchase price of said lands is to be paid in three equal yearly payments, payable on the 15th day of December, 1911, the 15th day of December, 1912, and the 15th day of December, 1913, respectively, said three latter payments to bear interest from and after the 15th day of December, 1910, until paid, at the rate of six per cent. per annum, payable annually, and

WHEREAS, The balance of said purchase price was $1,050,000 and one-third thereof, to-wit, $350,000, together with the sum of $65,000 interest on $1,050,000 from December 15, 1910 to December 15, 1911, was paid on December 14, 1911, leaving a balance of $700,000 payable in said purchase price as in said contract provided; and

WHEREAS, Under date of January 31, 1912, the Vice President and General Manager together with the Secretary of this company, entered into an agreement with said Carlton Investment Company, which said agreement is now present before this Board and has been read in full to this Board and is thoroughly understood by each member thereof and in and by which agreement it is provided that said Carlton Investment Company will accept in payment of said balance of $700,000 and interest thereon from and after December 15, 1911, at

the rate of six per cent. per annum, 760 First Refunding Mortgage Five per cent. Bonds of this Company, being at the rate of $925.00 per bond, with interest coupons Nos. 5 to 40 (both inclusive) attached, and the sum of $625.00 in money, and that this Company, its successors and assigns, shall have the right, privilege and option to purchase said bonds from said Carlton Investment Company, or from any pledgee or pledge holder of said bonds, at any time before the expiration of one year from and after the date of execution of said agreement, at the rate of $925.00 per bond, plus the accrued inter- [130] est thereon from the last semi-annual interest day preceding date of purchase up to the time of purchase; and

WHEREAS, Bonds numbered 16,039 to 16,-798 (both inclusive) with interest coupons attached as aforesaid, and said sum of $625. have been delivered and paid to said Carlton Investment Company pursuant to said agreement and said Carlton Investment Company has, pursuant to said agreement, executed and delivered to this company, deeds of all of the lands described in said contract of July 7, 1910, and in said Minutes of September 6, 1910, which deeds are all now of record in the office of the County Recorder of Kern County, in Vol. 238 of Deeds, Page 70 and Book 259 of Deeds, page 493 and are now on file in the office of the Secretary of this corporation; and

WHEREAS, The Vice President and General Manager reported the foregoing to the Executive Committee of this Board at its meeting held on the 6th day of February, 1912, and said Committee at said meeting ratified, approved and confirmed the action of the Vice President and General Manager and Secretary in the premises.

NOW THEREFORE, BE IT RESOLVED. That the action of the Vice President and General Manager and of the Secretary of this corporation, in entering into said agreement bearing date January 31, 1912, with said Carlton Investment Company and all of the acts of said Vice President and General Manager and of said Secretary and of the other officers of this company had and done pursuant to said agreement bearing date the 31st day of January, 1912, be and the same are hereby ratified, confirmed, approved and adopted as the agreement and acts and deeds of this corporation.

Motion to adopt the resolution was seconded by Director Whittier and upon being put to a vote was unanimously carried and so declared by the Chair. [131]

San Francisco, California,
May 21, 1930.

I, J. P. Edwards, hereby certify that I am the duly elected, qualified and acting Secretary of the Associated Oil Company, and that the foregoing

is a full, true and correct extract from minutes of meeting of Board of Directors of Associated Oil Company, duly called and held on March 5, 1912, at which meeting more than a quorum of the Board of Directors was present and voting in the affirmative.

J. P. Edwards,
Secretary,
Associated Oil Company. [132]

San Francisco, California,
May 21, 1930.

I hereby certify that the foregoing is a full, true and correct extract from Associated Oil Company's journal page No. 276, dated February 1912, the original of which is on file in the Accounting Department of Associated Oil Company, at its head office, 79 New Montgomery Street, San Francisco, California; that the remaining portions of said journal page relate to matters other than the above.

D. G. O'Harro,
Chief Accountant,
Associated Oil Company. [133]

FORM 381

DEPARTMENT NO.

AUDIT NO. 5020

ASSOCIATED OIL COMPANY

San Francisco, Cal., Aug. 6, 1910

REGISTERED IN

To WELLS FARGO NEVADA NAT'L BANK Dr.

Address SAN FRANCISCO, CAL.

E

For amount of Cashier's check to be used for real estate purchase. $25,000 00

Calculations correct. Examined by

The above account has been examined, found correct and registered:

Voucher Clerk Cashier Auditor

RECEIVED, 191 from **Associated Oil Company**

Twenty-five thousand// DOLLARS.

in full settlement of above account.

SAN FRANCISCO, CALIF 191 CHECK NO

Wells Fargo Nevada National Bank of San Francisco

IF PRESENTED WITHIN THIRTY DAYS FROM DATE AND PROPERLY RECEIPTED IN SPACE ABOVE

PAY TO THE PAYEE OF THIS VOUCHER, AS SHOWN ABOVE, OR ORDER. $25,000.00

Twenty-five thousand// DOLLARS

IN FULL SETTLEMENT OF ABOVE ACCOUNT.

COUNTERSIGNED

ASSOCIATED OIL COMPANY

2-K

ASST GENERAL MANAGER

TREASURER

Form 101

VOUCHER NO. _____ AUDIT NO. 8181

SOCIATED OIL COMPANY San Francisco, Cal., Aug.29th, 1910

ENTERED IN AUG 1910

To Mercantile Trust Company, Dr.

Address San Francisco, Cal.

For amount of payment due on or before Sept.1st, 1910, under the terms of that certain agreement dated July 7th, 1910, between C. D. Martin, E.R. Dudley, P.P. Dilly with Alton Investment Co.	$12,500 00

Calculations correct: [signature]

Examined by: [signature] Auditor

The above account has been examined, found correct and registered; [signature] Auditor

RECEIVED, August 29th 1910, from Associated Oil Company

Twelve thousand & five hundred - DOLLARS,

in full settlement of above account.

Mercantile Trust Company of San Francisco

2 - [signature] TRUST OFFICER

INSTRUCTIONS:

The receipt at the bottom of this voucher must be dated and signed by the payee, or by an authorized agent. When by the latter, the authority for so doing must be attached to the voucher or filed with this Company.
Officials of corporations must sign their full names and titles. Stamped signature or signature in pencil will not be accepted.
Should there be any mistake in the voucher, it should be returned to the AUDITOR for correction.

Form 101

VOUCHER No. _____ AUDIT No. 5112

ASSOCIATED OIL COMPANY

San Francisco, Cal., Sept.27th, '10

FILED IN SEP 1910

To Mercantile Trust Co., Dr.

Address San Francisco, Cal.

For amount of payment due on or before Oct.1st, 1910, under terms of that certain agreement dated July 7th, 1910, between G. D. Martin, E. R. Dudley, B.B. Dudley with Carlton Investment Co. $12,500 00

Calculations correct:	Examined by:	The above account has been examined, found correct and registered:
C.C. Smith		Auditor

RECEIVED, 9/28 1910 from Associated Oil Company

Twelve thousand & five hundred- DOLLARS.

in full settlement of above account.

Mercantile Trust Company of San Francisco

2711

TRUST OFFICER.

INSTRUCTIONS: The receipt at the bottom of this voucher must be dated and signed by the payee, or by an authorized agent. When by the latter the authority for so doing must be attached to the voucher or filed with this Company. Officials of corporations must sign their full names and titles. Stamped signature or signature in pencil will not be accepted. Should there be any mistake in the voucher, it should be returned to the AUDITOR for correction.

Form 101

ENT NO. _____

AUDIT NO. 19173

OCIATED OIL COMPANY

San Francisco, Cal., October 28th, 1910

ED IN

OCT 1910

To Mercantile Trust Company, Dr.

Address San Francisco, Cal.

For amount of payment due on or before November 1st, 1910 under terms of that certain agreement dated July 7th, 1910, between G. D. Martin, E.R. Dudley and B.B. Dudley with Carlton Investment Co.	$12,500 00

Calculations correct:	Examined by:	The above account has been examined, found correct and registered:
		Auditor

RECEIVED, OCT. 28. 1910 190__, from **Associated Oil Company**

Twelve thousand & five hundred#- DOLLARS,

in full settlement of above account.

Mercantile Trust Company of San Francisco.

TRUST OFFICER.

INSTRUCTIONS:

The receipt at the bottom of this voucher must be dated and signed by the payee, or by an authorized agent. When by the latter, the authority for so doing must be attached to the voucher or filed with this Company.
Officials of corporations must sign their full names and titles. Stamped signature or signature in pencil will not be accepted.
Should there be any mistake in the voucher, it should be returned to the AUDITOR for correction.

Form 101

Voucher No. _____ AUDIT No. 1190

SOCIATED OIL COMPANY

San Francisco, Cal., Nov. 29th, '10

ERED IN

NOV 1910

To Mercantile Trust Co., Dr.

Address San Francisco, Cal.

For amount of payment due on or before Dec. 1st, 1910, under terms of that certain agreement dated 7/7/10 between, G. D. Martin, R.R. Dudley, B.B. Dudley with the Carlton Inv.Co.	$10,000.00

WFN 5622
NOV 23 1910

alations correct:	Examined by:	The above account has been examined, found correct and registered:
P. Sanford	C. Burns Cashier	FOR THE Auditor.

EIVED, NOV. 30. 1910, 190 __, from Associated Oil Company

ten thousand - DOLLARS,

all settlement of above account.

Mercantile Trust Company of San Francisco

TRUST OFFICER.

INSTRUCTIONS:

The receipt at the bottom of this voucher must be dated and signed by the payee, or by an authorized agent. When by the latter, the authority for so doing to be attached to the voucher or filed with this Company.
Officials of corporations must sign their full names and titles. Stamped signature or signature in pencil will not be accepted.
Should there be any mistake in the voucher, it should be returned to the AUDITOR for correction.

Form 101

...t No. ______ AUDIT No. 12911

...CIATED OIL COMPANY

San Francisco, Cal., Dec.13th, '10

...IN To Mercantile Trust Co., Dr.

1910 Address San Francisco, Calif.

For amount of payment due on or before Dec.15th, 1910, under terms of that certain agreement dated 7/7/10, between G. D. Martin, E. R. Dudley, B.B. Dudley and the Carlton Investment Company			$75,000.00

A Fr N 5633

DEC 1 1910

...lations correct: R. Sanford

Examined by: C. E. ...

The above account has been examined, found correct and registered: ... Auditor.

...EIVED, DEC. 15. 1910 190__, from Associated Oil Company

...venty-five thousand#- DOLLARS,

...ull settlement of above account.

Mercantile Trust Company of San Francisco

2-p B M Sims

TRUST OFFICER.

INSTRUCTIONS:

The receipt at the bottom of this voucher must be dated and signed by the payee, or by an authorized agent. When by the latter, the authority for so doing ...t be attached to the voucher or filed with this Company.

Officials of corporations must sign their full names and titles. Stamped signature or signature in pencil will not be accepted.

Should there be any mistake in the voucher, it should be returned to the AUDITOR for correction.

San Francisco, California,
May 21, 1930.

I hereby certify that the foregoing are full, true and correct copies of Associated Oil Company's vouchers Nos. 8020, 8181, 9172, 10173, 11190, 12044, 12048 ---------- the originals of which are on file in the Accounting Department of Associated Oil Company, at its head office, 79 New Montgomery Street, San Francisco, California.

2-a

Chief Accountant,
Associated Oil Company

Form 892a. 500—9-11

No. ________ AUDIT No. 12048

[ASSOCI]ATED OIL COMPANY

San Francisco, Cal., Dec.14th, 1911

1911

To Carlton Investment Co., Dr.

Address San Francisco, Cal.

For amount due account purchase of 37½ sections of land in Kern County under agreement dated July 7th, 1910, between Carlton Investment Co. and J. D. Martin, E.R.Dudley and B.B. Dudley, and assigned to Associated Oil Co.

Total purchase price		$1,200,000.00
Heretofore paid		
July 7th, 1910	$2,500.00	
Aug 6th, "	25,000.00	
Aug 29th, "	12,500.00	
Sep.28th, "	12,500.00	
Oct.28th, "	12,500.00	
Nov.29th, "	10,000.00	
Dec.13th, "	75,000.00	150,000.00
Balance unpaid		$1,050,000.00

Balance being payable in three equal annual installments Dec.15th, 1911, Dec.15th, 1912 and Dec.15th, 1913, with interest at 6% payable annually.

#5791

One-third of above amount	350000 00
Interest on $1,050,000.00 from Dec.15th, 1910 to Dec.15th 1911	63000 00
Amount due	$413,000 00

[Computat]ions correct: [signature]

Examined by: [signature]

The above account has been examined, found correct and registered [signature] Auditor.

[Receiv]ed, Dec 14th 1911 from Associated Oil Company

[Fou]r hundred & thirteen thousand no/100 - - - - - - - - - - - - - - - - DOLLARS,

[in] full settlement of above account. Amount due as per

Carlton Investment Co
[signature] President

INSTRUCTIONS:

[Th]e receipt at the bottom of this voucher must be dated and signed by the payee, or by an authorized agent. When by the latter, the [authori]ty for so doing must be attached to the voucher or filed with this Company.
[Offic]ials of corporations must sign their full names and titles. Stamped signature or signature in pencil will not be accepted.
[If] there be any mistake in this voucher, it should be returned to the AUDITOR for correction.

Real Estate	700,000.00	
Interest on Deferred Payments	5,366.67	
Bonds owned unpledged—First Refunding Mortgage 5% Bonds		703,000.00
Interest on Deferred Payments		2,366.67

Being the balance due on Carlton Investment Lands, same being paid for in First Refunding Mortgage 5% Bonds, as per letter of W. A. Sloan, dated February 2, 1912. File A-96 as follows:

Total purchase price of lands	1,200,000.00
Amount previously paid	500,000.00
Balance due	700,000.00
Interest from 12/15/11 to 2/1/12	5,366.67
	705,366.67
760 A. O. Co. 1st Refunding Mortgage 5% Bonds	703,000.00
	2,366.67
Less interest on $760,000.00 at 5% from 1/15/12 to 2/1/12	1,741.67
Balance paid in cash	625.00

[134]

[Pages 135-142] inclusive, are photostats inserted opposite.

PETITIONER'S EXHIBIT 3.

TRANSCRIPT from the Minutes of First Meeting of the Board of Directors of Belridge Oil Company, held on January 25, 1911.

The Chairman then presented a letter from Mr. W. J. Hole, under date of January 25th, 1911, addressed to this company, which letter is in the words and figures following, to-wit:

Los Angeles, Cal., January 25, 1911.

Belridge Oil Company,
Los Angeles, Cal.

Gentlemen:

I hold an option to purchase certain lands in the County of Kern, State of California, as particularly described and set forth in the accompanying agreement, said option being from Emily B. Hopkins, and dated January 5th, 1911, and which said option to purchase carries with it certain rights to drill for oil and gas as in said agreement set forth.

I am willing and agree to sell, transfer and assign all my right, title and interest in and to said option, to the Belridge Oil Company in consideration of the issue to me of 999,995 shares of its capital stock.

All of which is respectfully submitted for consideration of the Board of Directors of said company.

Yours truly,
(Signed) W. J. Hole.

The Board thereupon entered into a discussion of the proposition of Mr. Hole as set forth in his letter aforesaid, after reading the said option to purchase from Emily B. Hopkins, and Director Todd presented and moved the adoption of the resolution next following:

> WHEREAS, Mr. W. J. Hole, has proposed and agreed to sell and assign to this corporation, all of his right, title and interest in and to that certain option to purchase from Emily B. Hopkins, dated January 5th, 1911, covering the lands described in said option, presented and read to this Board, in consideration for the issue to said W. J. Hole of 999,995 shares of the capital stock of this corporation of the par value of $1.00 per share; and
>
> WHEREAS, This corporation deems the acceptance of said proposition to be for the best interests of this corporation and of its stockholders;
>
> NOW, THEREFORE, BE IT RESOLVED, That the foregoing proposition of said W. J. Hole, be and the same is hereby accepted; and the President and Secretary of this corporation are hereby authorized and instructed to receive from said W. J. Hole, proper instrument in writing, duly executed, conveying and transferring all of his right, title and interest in and to said option to purchase from Emily B. Hopkins, dated January 5th, 1911, to this corporation, free and clear of all incumbrances,

		Trustee for F. B. Henderson	65	20	6,250)
"	"	Frank H. Buck, Trustee for F. B. Henderson	61	21	6,250)
"	"	M. H. Whittier, Trustee for F. B. Henderson	105	22	6,250)

CERTIFICATES CANCELLED.

Date	To Whom Issued	Ledger No.	Certificate No.	Number of Shares
	Original issue			1,000,000
1911				
Feb'y 1	A. G. Peasley	92	1	1
" "	G. C. Braniger	59	3	1
" "	W. G. Lackey	85	4	1
" "	T. McC. Todd	99	5	1
" "	W. J. Hole	78	6	999,995

I, F. B. SUTTON, Secretary of Belridge Oil Company, hereby certify that I have compared the above and foregoing entries with the entries in the stock journal of the Belridge Oil Company and the same is a true and correct transcript thereof.

WITNESS my hand and the seal of Belridge Oil Company this 21st day of May, 1930.

[Seal] F. B. Sutton,
Secretary of Belridge Oil Company. [145]

[Pages 146-150] inclusive, are photostats inserted opposite.

Form 100 20M-7-15-16-1456

Fill this blank in with typewriter. Write on one side of paper only

CALIFORNIA STATE MINING BUREAU

FERRY BUILDING, SAN FRANCISCO

LOG OF OIL OR GAS WELL

Field South End Company BELRIDGE OIL COMPANY

Township 26 S. Range 21 E. Section 33 Elevation 650 Number of Well 302

In compliance with the provisions of Chapter 718, Statutes 1915, the information given herewith is a complete and correct record of the present condition of the well and all work done thereon, so far as can be determined from all available records.

Signed .....

Date ..... Title .....
(President, Secretary or Agent)

Oil Sands

1st sand from 350 to 360 4th sand from 470 to 506

2d sand from 375 to 395 5th sand from 540 to 570

3d sand from 420 to 473 6th sand from ..... to .....

Important Water Sands

1st sand from ..... to ..... 3d sand from ..... to .....

2d sand from ..... to ..... 4th sand from ..... to .....

Casing Record

Size of Casing	Where Landed	Where Cut	Weight Per Foot	Threads Per Inch	Kind of Shoe	Make of Casing	Cemented Yes	Cemented No
12"	559		40	10				

Cementing or Other Shut-off Record

Size Hole	Depth	Time Set	Method	Test and Result (Give water level and bailing results)

Plugs and Adapters

Bearing Plug—Material ..... Length ..... Where set .....

Adapters —Material ..... Size .....

Perforations

State clearly whether a machine was used or casing was drilled in shop

	To	Size of Holes	Number of Rows	Holes Per Foot	Machine—Shop
	ft.				
	ft.				
	ft.				

Thirty days after completion well produced 1500 barrels of oil per day.

The gravity of oil was 26.5 degrees Baumé. Water in oil amounted to ..... per cent.

Names of Drillers	Names of Tool Dressers
J. Mc Nabney	J. H. Nabney
W. H. Kincaid	Ed Jennings
W. H. Krieghbaum	W. H. Krieghbaum

Date drilling started March 16, 1911 Date well was completed April 7, 1911

BOARD OF OIL APPEALS
CLAIMS 16 EXHIBIT 312
MAY 21 1930
RECEIVED
EXHIBIT 5

BELRIDGE OIL COMPANY

372 PACIFIC ELECTRIC BUILDING

ROY E. OWEN
Prospector

#302

Well No. (2)

LOS ANGELES, CAL.

Elevation 650'

From	To		
1	15	15	Lime stone and gypsum
15	30	15	Red sand
30	45	15	Grey sand
45	60	15	Yellow clay
60	128	68	Blue shale.
128	135	7	Blue sand
135	260	125	Blue shale
260	290	30	Dry oil sand
290	305	15	Blue shale
305	330	25	White clay
330	350	Black	Oil Sand
350	360	10	Oil Sand
360	375	15	Blue shale
375	395	20	Oil Sand
395	450	55	Blue shale
450	473	23	Oil Sand
473	490	17	Blue clay
490	506	16	Oil Sand
506	540	34	Blue clay
540	570	30	Oil Sand
570	575	5	Blue shale
		575	

5-2

oil struck at 350

Fill this blank in with typewriter. Write on one side of paper only

CALIFORNIA STATE MINING BUREAU

FERRY BUILDING, SAN FRANCISCO

LOG OF OIL OR GAS WELL

FIELD South End Company BELRIDGE OIL COMPANY

Township 32 S. Range 21 E. Section 33 Elevation 650 Number of Well 707

In compliance with the provisions of Chapter 718, Statutes 1915, the information given herewith is a complete and correct record of the present condition of the well and all work done thereon, so far as can be determined from all available records.

Signed

Title (President, Secretary or Agent)

Oil Sands

1st sand from 350 to 360 4th sand from 490 to 506

2nd sand from 375 to 395 5th sand from 540 to 570

3rd sand from 450 to 473 6th sand from to

Important Water Sands

1st sand from to 3d sand from to

2nd sand from to 4th sand from to

Casing Record

Size	Where Landed	Where Cut	Weight Per Foot	Threads Per Inch	Kind of Shoe	Make of Casing	Cemented Yes	Cemented No
10	559		40	10				

Cementing or Other Shut-off Record

Size	Depths	Time Set	Method	Test and Result (Give water level and bailing results)

BOARD OF TAX APPEALS
DEC 16 1930
EXHIBIT 2

Plugs and Adapters

Kind of Plug—Material Length Where set

Packers—Material Size

Perforations

State clearly whether a machine was used or casing was drilled in shop

Size	From	To	Size of Holes	Number of Rows	Holes Per Foot	Machine—Shop
10	ft.	ft.				

Thirty days after completion well produced barrels of oil per day

The gravity of oil was 26.5 degrees Baumé. Water in oil amounted to per cent.

Names of Drillers	Names of Tool Dressers
W. Mc Enery	W. H. Jennings
Chas. Kimball	Ed Jennings
W. H. Koeppenrum	W. H. Koeppenrum

Date drilling started March 10, 1911 Date well was completed April 7, 1911

Formations Penetrated by Well

Depth To Bottom of Formation	Thickness	Name of Formation

5-B

Form 100 10077—3-16-16—1700

Fill this blank in with typewriter. Write on one side of paper only

CALIFORNIA STATE MINING BUREAU

FERRY BUILDING, SAN FRANCISCO

LOG OF OIL OR GAS WELL

Field South End Company BELRIDGE OIL COMPANY

Township 32 S Range 21 E Section 33 Elevation 582 Number of Well 101

In compliance with the provisions of Chapter 718, Statutes 1915, the information given herewith is a complete and correct record of the present condition of the well and all work done thereon, so far as can be determined from all available records.

Signed

Date Title (President, Secretary or Agent)

Oil Sands

1st sand from 445 to 490 4th sand from 620 to 760

2d sand from 602 to 620 5th sand from to

3d sand from 615 to 640 6th sand from to

Important Water Sands

2d sand from to 3d sand from to

1st sand from to 4th sand from to

Casing Record

Casing	Where Landed	Where Cut	Weight Per Foot	Threads Per Inch	Kind of Shoe	Make of Casing	Connected Yes	Connected No
10	445		54	8				
12	761		40	10				

Cementing or Other Shut-off Record

Size	Sacks	Time Set	Method	Test and Result (Give water level and bailing results)

Plugs and Adapters

Heaving Plug—Material Length Where set

Adapters Material Size

Perforations

State clearly whether a machine was used or casing was drilled in shop

From	To	Size of Holes	Number of Rows	Holes Per Foot	Machine—Shop
ft	ft				
ft	ft				
ft	ft				

RECEIVED MAY 27 1940 EXHIBIT

Thirty days after completion well produced 11 barrels of oil per day.

The gravity of oil was 24 degrees Baumé. Water in oil amounted to

---

BELRIDGE OIL COMPANY

372 PACIFIC ELECTRIC BUILDING

STON E. GREEN PRESIDENT

#101

Well No. 1

LOS ANGELES, CAL.

Elevation 582'

5-C

From	To		
1	20	20	White sand
20	50	30	Sand stone
50	52	2	Blue clay
52	80	28	Dark sand
80	115	35	Brown sand
115	125	10	Blue clay
125	150	25	Sandy shale
150	155	5	Blue shale
155	190	35	Sand and blue clay
190	230	40	Sandy shale
230	260	30	Hard sand
260	280	20	Grey sand
280	290	10	Tar sand
290	320	30	Blue shale
320	330	10	Brown shale
330	360	30	Tar sand
360	365	5	Blue shale
365	397	32	Tar sand
397	400	3	Sandy shale
400	410	10	Blue shale
410	415	5	Tar sand
415	440	25	Brown sandy shale
440	445	5	Blue shale
445	480	35	Oil sand
480	545	65	Blue clay
545	548	3	Gravel
548	597	49	Blue clay
597	600	3	Grey sand
600	602	2	Blue clay
602	606	4	Oil Sand
606	608	2	Hard sand
608	611	3	Blue shale
611	630	19	Brown shale
630	635	5	Hard sand
635	640	5	Oil Sand
640	650	10	Brown shale
650	760	110	Oil Sand
760	775	15	Brown shale
775	782		

782

Fill this blank in with typewriter. Write on one side of paper only

CALIFORNIA STATE MINING BUREAU

FERRY BUILDING, SAN FRANCISCO

LOG OF OIL OR GAS WELL

Field South End Company LEDGE OIL COMPANY

Township 27 S. Range 21 E. Section 33 Elevation 582 Number of Well 101

In compliance with the provisions of Chapter 718, Statutes 1915, the information given herewith is a complete and correct record of the present condition of the well and all work done thereon, so far as can be determined from all available records

Signed

Date Title (President, Secretary or Agent)

Oil Sands

1st sand from 445 to 470 4th sand from 650 to 760

2d sand from 602 to 620 5th sand from to

3d sand from 625 to 640 6th sand from to

Important Water Sands

2d sand from to 3d sand from to

1st sand from to 4th sand from to

Casing Record

Casing	Where Landed	Where Cut	Weight Per Foot	Threads Per Inch	Kind of Shoe	Make of Casing	Cemented Yes	Cemented No
1	2[illegible]1		54	8D				
2	2[illegible]1		40	10				
3								
4								

Cementing or Other Shut-off Record

Size	Sacks	Time Set	Method	Test and Result (Give water level and bailing results)

Plugs and Adapters

Leaving Plug—Material Length Where set

Adapters—Material Size

Perforations

State clearly whether a machine was used or casing was drilled in shop

	To	Size of Holes	Number of Rows	Holes Per Foot	Machine—Shop
1st	ft.				
2d	ft.				
3d	ft.				

Thirty days after completion well produced barrels of oil per day

The gravity of oil was degrees Baumé. Water in oil amounted to per cent.

Names of Drillers	Names of Tool Pushers
[illegible]	[illegible] Joslyn
[illegible]	Geo Adams
[illegible]	R Hoffey
[illegible]	T Jeffrey

Drilling started [illegible] Date well was completed April 24, 1911

Formations Penetrated by Well

Depth To	Thickness	Name of Formation
Top	Bottom of Formation	

5-15

DEPARTMENT OF THE INTERIOR
U S GEOLOGICAL SURVEY

CALIFORNIA
CHOLAME QUADRANGLE

DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY

PLATE I.

CALIFORNIA
LOST HILLS QUADRANGLE

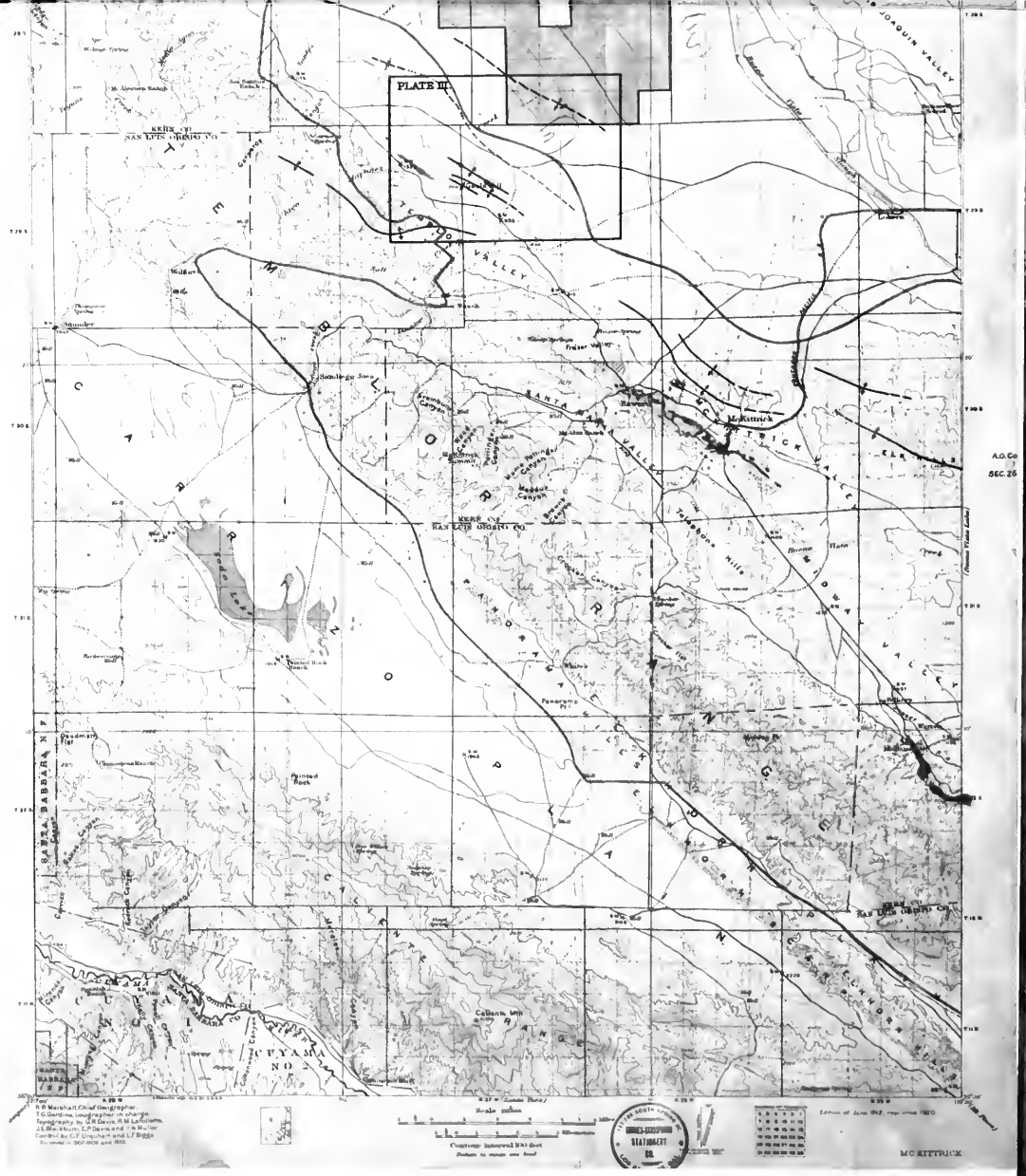
R.20 E. R.21 E. R.22 E.

PRELIMINARY EDITION

PLATE II.

GEOLOGIC AND STRUCTURAL DATA
AS OF
1908 AND 1911.

- Belridge holdings.
- Limits of productive oil territory (U.S.G.S. Bul. 406)
- Anticline : actual and probable.
- Syncline : actual and probable.
- Oil and gas showings.
- Producing areas, 1911 and earlier.
- Producing area : Midway, 1908.



[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF THE RECORD.

To the Clerk of the United States Board of Tax Appeals:

You are requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to the review taken in the above entitled case, and to include in such transcript of record copies duly certified as correct of the following documents:

(1) The docket entries of the proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board.

a. Petition with Exhibit "A" (a copy of notice of deficiency attached).

(3) Findings of Fact, opinion and decision of the Board, including final order of redetermination.

(4) Dissenting opinion filed by Hon. Stephen J. McMahon, Member of the United States Board of Tax Appeals. [151]

(5) Petition for Review and Assignments of Error.

a. Notice of filing thereof with admission of service.

b. This Praecipe.

(6) Statement of Evidence with all exhibits attached.

CLAUDE I. PARKER,
JOHN B. MILLIKEN,
808 Bank of America Building,
Los Angeles, California,
LLEWELLYN A. LUCE,
937 Munsey Building,
Washington, D. C.
Counsel for Petitioner.

Service of copy accepted, December 19, 1932.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Counsel for Respondent.

[Endorsed]: Filed December 19, 1932. [152]

[Title of Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 152, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax

Appeals, at Washington, in the District of Columbia, this 21st day of February, 1933.

[Seal] B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 7103. United States Circuit Court of Appeals for the Ninth Circuit. Belridge Oil Company, a corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed March 4, 1933.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 7103.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Belridge Oil Company, a corporation,
Petitioner and Appellant,

vs.

Commissioner of Internal Revenue,
Respondent.

BRIEF FOR PETITIONER AND APPELLANT.

CLAUDE I. PARKER,
JOHN B. MILLIKEN,
BAYLEY KOHLMEIER,
808 Bank of America Bldg., Los Angeles, California,
Attorneys for Petitioner.

Of Counsel:
LLEWELLYN A. LUCE,
937 Munsey Bldg.,
Washington, D. C.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

In
St
St
Q
A

TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

No. 7103.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Belridge Oil Company, a corporation,
Petitioner and Appellant,

vs.

Commissioner of Internal Revenue,
Respondent.

BRIEF FOR PETITIONER AND APPELLANT.

INTRODUCTION.

This is an appeal from a final order of the United States Board of Tax Appeals affirming the action of the Commissioner of Internal Revenue in determining that there is a deficiency in petitioner's income and excess profits tax for the calendar year 1921 in the amount of $45,293.85.

On July 18, 1927, in accordance with the provisions of section 274 of the Revenue Act of 1926, the Commissioner of Internal Revenue, respondent herein, notified the petitioner that his investigation of the income tax return of

petitioner for the year 1921 disclosed a deficiency in income and excess profits tax in the amount of $45,293.85. From this determination the petitioner duly filed its appeal to the United States Board of Tax Appeals. Thereafter, on May 22, 1930, the proceeding came to trial before the Board, the Honorable Stephen J. McMahon, member, presiding. On August 16, 1932, the Board promulgated its findings of fact and opinion in said appeal and on August 17, 1932 the Board entered its final order of redetermination sustaining the Commissioner's determination. Said opinion is reported in 26 B. T. A. 810. Appeal from this order is brought to this court by petition for review filed November 15, 1932, pursuant to the provisions of sections 1001-1003 of the Revenue Act of 1926 as amended by section 1101 of the Revenue Act of 1932.

STATUTE INVOLVED.

Section 326 (a) of Revenue Act of 1921:

"Sec. 326 (a) That as used in this title the term 'invested capital' for any year means:

(1) Actual cash *bona fide* paid in for stock or shares;

(2) Actual cash value of tangible property, other than cash, *bona fide* paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value in which case such excess shall be treated as paid-in surplus: * * *"

STATEMENT OF FACTS.

In 1910 and prior thereto one, Emily B. Hopkins, now deceased, owned 30,845.96 acres of land, in an unbroken parcel located in Kern county, California, between McKittrick and Lost Hills. [R. 65.] Mrs. Hopkins did not personally manage this property but lived in New York and left the management to her agents, C. A. Grove, the Stearns Rancho Co. and one William Hill. [R. 65-66.] In 1910 one, W. J. Hole, who had had considerable experience as a real estate dealer in California and who had been resident agent for the Stearns Rancho Co. [R. 64] by reason of his former association with Mrs. Hopkins and her agents, was able to secure an option from her for the purchase of said 30,845.96 acres of property for $20 per acre. [R. 66.] Hole desired this option for the reason that he thought it valuable agricultural land and that since it was located between oil producing properties it might be valuable as oil property. [R. 67.] Hole, however, was not an experienced oil man and, to his knowledge, the property was virgin territory for oil purposes. [R. 67.]

During the year 1910, one William Van Slyke, who was an experienced oil operator [R. 76] had occasion to go upon the Hopkins property. [R. 77.] He noticed outcroppings upon the land which were similar to outcroppings upon proven oil land. [R. 77.] He later returned to the property, dug a 14 foot hole and discovered oil sands which he tested and which proved to be live oil sands. [R. 77.] He covered the hole with planks and brush, so that it would not be discovered. [R. 78.] Van Slyke informed one, Max Whittier, now deceased, of his discovery and was advised by Whittier not to disclose the information to any one and that Whittier would

attempt to acquire some of the land. [R. 78.] Whittier also visited the property with Van Slyke. [R. 78.]

About this time Hole approached Whittier, whom he knew to be an experienced oil man, told him that he had an option to purchase the Hopkins property and offered to sell the property to Whittier for $33⅓ per acre and a one-fifth interest in any company organized to take it over. [R. 67 and 83.] Hole did not tell Whittier of the terms of his option [R. 69] and Whittier did not tell Hole of Van Slyke's discoveries upon the property. [R. 70.] Whittier took Hole to interview one, Burton E. Green, an experienced and successful oil man and an associate of Whittier, who had been informed of Van Slyke's discovery and who was familiar with the general territory. [R. 67 and 83.] At this interview Whittier and Green agreed to take the option if it could be revamped to allow them to drill for oil before exercising the option. [R. 83.]

Hole started negotiations to secure the new option and in order to do so was forced to enlist the services of one, Benedict, a cousin of Mrs. Hopkins, and her agent, William Hill. Hole paid Benedict $125,000 and Hill $35,000 and one-fourth of Hole's stock in petitioner for their services in securing the option. [R. 69.] The option desired was finally secured on Jan. 5, 1911 and it provided very favorable terms for the drilling of the test wells before exercising the option and for the sale of the property to Hole for $33⅓ per acre. The consideration paid to Mrs. Hopkins for the option was $25,000 [Ex. 1, R. 155], which $25,000 was furnished by Green. [R. 100.]

Petitioner was organized in January, 1911 and on January 25, 1911, Hole assigned the option of January 5,

1911 to petitioner in exchange for 999,995 shares of stock of petitioner. [Ex. 3, R. 168-170.] Hole retained one-fifth of the stock and immediately transferred the balance to Whittier, Green, M. J. Connell and Frank Buck, the latter two men having been taken into the deal. [Ex. 4, R. 171-172.]

According to the "logs" of the first and second wells begun on March 11 and March 18, 1911, respectively, and completed on April 21, 1911, and April 7, 1911, respectively, oil sand was first struck at between 445 and 480 feet and it produced 100 barrels of oil per day, 25.3 degrees Baume, thirty days after completion, and oil sand was struck in the second well at between 350 and 360 feet and it produced 100 barrels per day, 26.5 degrees Baume, thirty days after completion. [Exhibit 5, R. 172.]

Petitioner contends that the option on the Hopkins property of January 5, 1911, had an actual cash value at January 25, 1911 in excess of the par value of the stock issued for it on that date. Respondent contends that the said option had an actual cash value at January 25, 1911 of only $25,000 and has excluded from petitioner's invested capital for 1921 "Stock discount $974,995", representing that portion of the par value of capital stock $999,995, issued in 1911 for the option upon the Hopkins property, in excess of $25,000. The Board of Tax Appeals in its decision, 26 B. T. A. 810, upheld the determination of the respondent.

QUESTIONS PRESENTED.

As stated by the Board of Tax Appeals in its opinion [R. 26], the sole question presented for its determination was "the 'actual cash value' of the option 'at the time of' its payment for the capital stock of petitioner on January 25, 1911. (Section 326 of the Revenue Act of 1921.) It is conceded by counsel for the respondent that if the value of the option is satisfactorily substantiated there is no question about its inclusion in invested capital to the extent justified by the proof".

The present appeal presents to this Honorable Court for consideration the following questions:

1. Was the finding and opinion of the Board Member that the "actual cash value" of the option on January 25, 1911 did not exceed $25,000.00 supported by substantial evidence?

2. Did the Board Member err in disregarding the testimony of petitioner's expert witnesses and other competent evidence as to the actual cash value of the option on January 25, 1911?

3. Did the Board Member err in failing to conclude under all the evidence that the option had an actual cash value on January 25, 1911 of at least $1,000,000.00?

ASSIGNMENTS OF ERROR.

(1) The United States Board of Tax Appeals erred in making and entering its decision in this cause and in entering judgment in favor of Commissioner and against taxpayer.

(2) The United States Board of Tax Appeals erred as a matter of law and fact in deciding that the option which

taxpayer acquired on January 25, 1911, had only a value, for invested capital purposes, of $25,000.00.

(3) The United States Board of Tax Appeals erred as a matter of law, in disregarding the competent testimony of qualified witnesses that the option which taxpayer acquired on January 25, 1911, had an actual cash value of at least $1,000,000.00 for invested capital purposes.

(4) The United States Board of Tax Appeal erred in its conclusions of law and its application of the law to the facts.

(5) The United States Board of Tax Appeals erred in that the decision, opinion and order of the Board are contrary to the evidence and are not supported by the evidence.

(6) The United States Board of Tax Appeals erred in redetermining a deficiency against this taxpayer for the year 1921 amounting to $45,293.85.

(7) The United States Board of Tax Appeals erred in that there is neither in the findings of fact by the Board nor in the opinion by the Board, any findings of fact to sustain the Board's conclusions of law as set forth in the Board's opinion and decision.

(8) The United States Board of Tax Appeals erred in that its conclusions of law stated in its opinion are contrary to and not in harmony with the Board's findings of fact.

(9) The United States Board of Tax Appeals erred in that the opinion and decision of the Board, based upon the Board's findings of fact, are contrary to law.

1. **Whether the Findings of Fact and Opinion of a Member of the United States Board of Tax Appeals Are Supported by Substantial Evidence Is a Question of Law and a Proper Question for This Court to Determine Upon a Petition for Review.**

This proceeding to review the decision of the United States Board of Tax Appeals presents the question to this court of whether the findings of fact and the decision of a member of the Board are supported by substantial evidence. It is now well settled by the decisions of this court as well as decisions of other Circuit Courts of Appeal that whether the findings of fact of the Board of Tax Appeals are supported by substantial evidence is a question of law and a proper question for review by the Circuit Court of Appeals. And it has also been held that when the findings of fact and decisions of the Board are not supported by substantial evidence, the decision must be reversed and set aside.

See:

Buena Vista Land and Development Company v. Lucas (C. C. A. 9), 41 Fed. (2d) 131;

Citrus Soap Company of California v. Lucas (C. C. A. 9), 42 Fed. (2d) 372;

Royal Packing Company v. Commissioner (C. C. A 9), 22 Fed. (2d) 536;

Planters Operating Company v. Commissioner of Internal Revenue (C. C. A. 8), 55 Fed. (2d) 583;

Boggs and Buhl v. Commissioner (C. C. A. 3), 34 Fed. (2d) 859;

Chicago Railway Equipment Company v. Blair (C. C. A. 7), 20 Fed. (2d) 10;

Washburn v. Commissioner (C. C. A. 8), 51 Fed. (2d) 949;

Dempster etc. Company v. Burnet (Ct. App. D. C.), 46 Fed. (2d) 604;

Conrad and Company v. Commissioner (C. C. A. 1), 50 Fed. (2d) 576;

Pittsburgh Hotels Company v. Commissioner (C. C. A. 3), 43 Fed. (2d) 345.

2. Findings of Fact and Opinion of a Member of the United States Board of Tax Appeals Are Not Entitled to as Much Weight When the Member Dissents Who Heard the Testimony.

As a general rule, the findings of fact of the United States Board of Tax Appeals or of any trier of facts are entitled to considerable weight on appeal for the reason that the trier of facts has had an opportunity to pass upon the credibility of the witnesses and the weight to be given their testimony and the Board or trier of facts which hears such testimony is in a better position to determine the weight to be given the same than is a court which merely has access to the record. It is submitted, however, that this general rule does not apply in the case at bar where the only member of the Board who heard the testimony files a vigorous dissenting opinion and especially is this true as in the case at bar where the dissenting member in his dissenting opinion states that he was highly impressed by the intelligence, sincerity and integrity of the witnesses.

The member of the Board who rendered the decision in the case at bar was not present at the trial of this cause

and had no better means of determining the sufficiency and credibility of the testimony than has this court. The decision in the case at bar cannot be upheld upon the ground that the testimony was not reliable nor that the credibility of the witnesses is in issue for the member of the Board who heard the case found no cause to doubt the testimony in this regard and in his opinion specifically refers to "the candor, earnestness, sincerity and intelligence" [R. 38] with which the witnesses testified. Neither can it be said that the member who wrote the opinion under review exercised his independent judgment and determined the case based upon his expert knowledge and training for in the majority opinion it is stated—"* * * nor, have we substituted our own 'knowledge, experience and judgment' for the opinion of these experts". [R. 37.]

The Circuit Court of Appeals for the Second Circuit had presented to it a similar situation in the case of *Jewett and Company v. Commissioner,* 61 Fed. (2d) 471, and that court had the following to say where the dissenting member heard the testimony:

> "It was of course possible for the Board to discredit the witness altogether. He was highly interested, and might well stretch the facts in his favor, especially upon a matter of opinion. Uncasville Mfg. Co. v. Com'r., 55 Fed. (2d) 893, 897 (C. C. A. 2). But this was scarcely such; the patterns were used, or they were not; and the witness knew the facts. Even so, had the Board discredited him, we might accept it, since one member at least is always present when the testimony is taken. In the case at bar it was this member, however, who dissented, so that the decision cannot rest upon the appearance of the witness. But neither the findings nor the opinion sug-

gest that the witness was discredited, and we have as much before us as those members who decided the case. Upon the cold record it seems to us that the evidence is uncontradicted that all the patterns were in some use during the years in question. The Commissioner's ruling was certainly wrong; and whether the use was little or not, the depreciation charge should be fixed upon a base calculated upon the whole cost or value. If so, there was no deficiency."

In view of the fact that the question presented here is one of fact and the member who heard the testimony not only dissented but filed a very convincing dissenting opinion, it is submitted that the decision and finding of the member who wrote the opinion is not entitled to as much weight as would be true under contrary circumstances. In fact it is most extraordinary that the member who heard the testimony should not prevail with respect to the decision rendered.

3. The Findings of Fact and Opinion of the Member of the Board of Tax Appeals Is Not Supported by the Evidence.

(a) Fallacies in Findings and Opinion of Board Member.

Since the findings of fact and conclusions of the member of the Board were based entirely upon the record and since they vary quite widely from the conclusions of the dissenting member as well as from the testimony of record, the following analysis of the findings of fact and opinion of the member of the Board is here presented with corresponding marginal references to the record and to the dissenting opinion of the member who heard the testimony.

Findings of Fact and Opinion of Member of Board of Tax Appeals	*Transcript of Record and Dissenting Opinion*
1. The transaction between Hole and Mrs. Hopkins was an arm's length transaction. [R. 28.] Mrs. Hopkins' representatives took proper precautions to protect her interests. [R. 29.]	1. *Record*—Hole secured option through one Benedict, a cousin of Mrs. Hopkins, to whom he paid $125,000 and one Hill, an agent of Mrs. Hopkins to whom he paid $35,000 cash and one-fourth of Hole's stock in petitioner. [R. 69.] Hole had a business relationship with Mrs. Hopkins which made it possible for him to receive preferential treatment. [R. 66.] *Dissenting Opinion*—The parties did not have equal knowledge of the facts. Mrs. Hopkins' representatives were not acting for her best interests. The transaction was not an arm's length transaction. [R. 41-43.]
2. a—Associated Oil Company's property was more favorably situated than the Belridge property. [R. 29-30.]	2. a—*Record* — Witness Johnson testified that Associated Oil Company's property was less valuable for oil than the Belridge property. [R. 129-130.] Petitioner's Exhibit 6 [R. 172] shows that Belridge property was more favorably located as to producing areas and anticlines.

Dissenting Opinion—Associated property not as valuable or as favorably located for oil as Belridge property. [R. 45.]

b—No evidence of state of development of Associated property at time of purchase.

b—*Record*—Witness Johnson testified that the closest oil production to Belridge property in 1911 was in Temblor Range Field, five miles south and Lost Hills, five miles north. [R. 115.] Associated property described in Petitioner's Exhibit 2 [R. 156] when located on Petitioner's Exhibit 6 [R. 172] is shown to be in the area in which there was no oil production.

Dissenting Opinion—"The maps, Petitioner's Exhibit 6, demonstrate that none of that property (Associated) was developed as oil land previous to 1911 and that previous to 1911 there were no indications of oil or gas upon that land. [R. 45.]

3. Whittier's offer of $500,000 for Connell's one-fifth of capital stock of petitioner was not a definite offer. [R. 30.]

3. *Record*—Connell testified that Whittier made a definite offer of $500,000 for his interest in the stock of petitioner and such offer was made before development for oil on the Belridge property. [R. 105.]

Green testified that Whittier offered Connell $500,000 for his interest. [R. 88.]

4. Green's valuation based only upon hearsay knowledge of other sales and what he thought other companies would have paid had they possessed the information which he had. [R. 31.]

4. *Record*—Green had extensive experience in purchasing oil property both for himself and corporations. [R. 79-81.] He was familiar with property in question and surrounding properties. [R. 82.] He examined the property in 1911. [R. 82.] His valuation was based upon his experience, his knowledge of oil properties and what was paid for them, his knowledge of the property in question and what he would have been willing to pay at that time—opinion not based purely on hearsay. [R. 102.]

Dissenting Opinion—Witness Green was intelligent, candid and well qualified. [R. 38-46 and 50.]

5. a—Johnson visited property two weeks before hearing to qualify himself as witness. [R. 31 and 34.]

5. a—*Record*—In 1907 and 1908 Johnson surveyed this general vicinity for the United States Government and made report of this land as oil bearing property. [R. 114.] He was acquainted with Belridge property in 1910 and 1911. [R. 114.]

Dissenting Opinion — In 1911, Johnson was informed

as to condition of property. [R. 47.]

b—Johnson's valuation was based upon his education and experience as geologist.

b—*Record*—In addition to being a geologist and being familiar with the property in question, Johnson was in 1910 and 1911 actively engaged in the business of advising persons in regard to the purchase of oil properties. [R. 122.] Persons bought and sold property based upon the opinion of Johnson. [R. 122.] His opinion was based upon his experience in dealing with oil properties as well as his education and experience as a geologist. [R. 128.]

Dissenting Opinion—Johnson was well qualified. [R. 47-48 and 49.]

6. Orcutt visited property a week before hearing and based testimony on structure of land and his scientific education and experience. [R. 32 and 34.]

6. *Record*—Orcutt has been in oil business since 1897. [R. 131.] In 1910 and 1911 he advised Union Oil Co. with respect to its purchases and leases. [R. 132.] In 1910 and 1911 he was familiar with property around Belridge property. [R. 132.] Orcutt inspected Belridge property shortly before trial to confirm facts and conditions known to him in 1911. [R. 132.]

Dissenting Opinion—Orcutt well qualified. [R. 48-49.]

7. Record before Board upon which decision was made in 11 B. T. A. 127 was the same in all essential respects as record in case at bar. [R. 28.]

7. Record and Dissenting Opinion—Member who wrote opinion in case at bar agrees that the decision in 11 B. T. A. 127 is not *res adjudicata* of the case at bar. [R. 26.] In the Dissenting Opinion at R. 51, 52, 53, 54, 55 it is conclusively shown that additional and important evidence was adduced which was not in evidence when the decision was reached in 11 B. T. A. 127.

8. Witness for petitioner testified to theoretical value, given twenty years after transaction and based upon geological observations. [R. 34, 36.]

8. *Record*—Witness Johnson did not base estimate on a theoretical basis but upon knowledge had in 1911 of conditions and sales of property. [R. 127.] Witness Orcutt did not give estimate on theoretical basis but upon knowledge had in 1911 of actual conditions. [R. 134.] Both Johnson and Orcutt gave estimates using their geological training as well as actual experience in advising with respect to sales. [R. 128 and 134.]

Both Johnson and Orcutt closed their minds in giving estimates of value and developments subsequent to 1911. [R. 128 and 134.] Witness Green thoroughly familiar with property in 1911 and

opinion based upon extensive trading and experience in buying and selling oil properties. [R. 102.] Green determined value of property at $100 per acre prior to the time the corporation secured the option in 1911. [R. 92.]

Dissenting Opinion—The Dissenting Opinion refutes statements that opinions were based upon theoretical estimates and primarily on geological training.

See Dissenting Opinion as to Johnson [R. 47]; Orcutt [R. 48]; and Green [R. 46].

It is submitted that pursuant to the above marginal analysis the opinion of the Board Member erroneously interpreted the record and the testimony in many vital respects. The opinion differs widely in its findings and conclusions from the findings and conclusion as made by the member who heard the testimony and who filed a dissenting opinion. It is submitted that the findings and conclusions of fact of the member who presided at the hearing and who heard the testimony are entitled to much greater weight than the conclusions of a member who reviewed the record and prepared the opinion and had no opportunity to observe the witnesses at the trial of the case. It is at once apparent from the opinion of the Board Member that scant credibility was given to the

testimony of the witnesses and this despite the fact that each of the witnesses was familiar with the property in the year 1911 and was well qualified in all respects to express an opinion as to the value of the property in question. The qualifications, intelligence and intergrity of the witnesses was unchallenged at the trial of this cause. Their testimony was logical and their opinions are supported by reason and stand uncontradicted. There was practically no cross-examination of witnesses for petitioner and the cross-examination that did occur did not weaken in any important particular the testimony as given. In addition thereto, no evidence whatsoever was offered on behalf of the Commissioner of Internal Revenue at the trial of this case. Such being the facts, it is respectfully submitted that the Board member who wrote the opinion in this case erred in disregarding the testimony of the witnesses as adduced.

See:

Royal Packing Co. v. Commissioner, 22 Fed. (2d) 536;

Buena Vista Land & Development Co. v. Lucas, 41 Fed. (2d) 131;

Citrus Soap Co. v. Lucas, 42 Fed. (2d) 372;

Planters Operating Co. v. Commissioner, 55 Fed. (2d) 523;

Pittsburgh Hotels Company v. Commissioner, 43 Fed. (2d) 345;

Bonwit, Teller and Company v. Commissioner (C. C. A. 2), 53 Fed. (2d) 381.

(b) The Board Member Determined Value By An Erroneous Method.

The Board Member in rendering his decision has apparently disregarded all evidence presented and rests his decision entirely upon the fact that Mrs. Emily Hopkins granted an option to one Hole for the sum of $25,000.00. The Board Member seemed to be of the opinion that since here was evidently a cash consideration for the option, no other evidence of value could be authoritatively considered by him regardless of the fact that the particular consideration may not have represented a fair sale or an arm's length transaction or that the property as to which the option was given had a much greater value when the same was secured by the corporation and it exchanged its capital stock for the same.

The vital question is of course the value of the option at the date the corporation issued its shares of stock for the same. It is a well established fact that values for prospective oil lands may violently fluctuate over night. The organizers of the petitioner corporation were in full possession of information which demonstrated the option to be of very great value and largely in excess of the price called for in the option agreement of January 5, 1911. [Exhibit 1, R. 144.] Regardless of what price may have been paid Mrs. Hopkins, the same is not an absolute criterion of value in the hands of the corporation. And it is submitted it was error to disregard all of the surrounding and attendant circumstances and determine a value only in the amount called for in the option agreement of January 5, 1911. The value of the option would undoubtedly be admitted had the corporation issued its stock for it during March, 1911 when drilling for oil was

under way. The fact that only a month or so before, to-wit, on January 25, 1911, the stock was issued for the option, should not change the fact that it is susceptible of proof that the value was inherent in the option and that the stockholders were justified in the amount of stock which was issued for the same.

It must be borne in mind that there is in the instant case no question of an attempt to evade a higher tax because all of the transactions here in question happened long before the incidence of the Sixteenth Amendment to the Constitution which permitted the imposition of an income tax and the good faith of the entire transaction is questioned by no one. It cannot be supposed that the stockholders in organizing this corporation in 1911 had even the remotest idea that the issuance of capital stock would become important in the computation of invested capital with respect to the year 1921. The state of California sanctioned the issuance of capital stock for the option and the presumption is that the petitioner corporation acted lawfully instead of unlawfully in the issuance of its stock and that the option possessed a value equal to the value of the stock issued therefor. Cf. *Sioux City Stock Yards Co. v. Commissioner,* 59 Fed. (2d) 944, and *Rookwood Pottery Co. v. Commissioner,* 45 Fed. (2d) 43.

It is true that the Board Member who wrote the opinion in this case did decide that the option price obtained by Mrs. Hopkins from Hole was a fair one and that it was an arm's length transaction. But as convincingly set forth in the dissenting opinion [R. 41-43], such conclusion is contrary to the evidence. The evidence is clear that Mrs. Hopkins did not personally manage her property; that she lived in New York [R. 66] and left the manage-

ment of her property entirely to her agents, including one William Hill. [R. 65.] It is further clear that W. J. Hole who secured the option from Mrs. Hopkins was not experienced with respect to oil property and that when he obtained the option, he was not aware of the definitely favorable discoveries of oil sands that had been made on the property of Mrs. Hopkins by one Van Slyke. [R. 70, 83.] It is fair to conclude from the record that neither Mrs. Hopkins nor her agents had knowledge with respect to the oil producing possibilities of the land in question and the dissenting opinion points out that the clear inference is that they had no such knowledge. [R. 41.] The record is singularly clear on the other hand that Whittier and Green who furnished the money for securing the option were experienced oil men and had verified the discoveries of Van Slyke and reached definite and concrete conclusions as to the value of the land in question. Thus it cannot be said that all parties to the transaction were in possession of equal knowledge either as to property or values.

Further, the negotiations with Mrs. Hopkins were carried on through W. J. Hole. [R. 69.] Hole, by reason of business relations with Mrs. Hopkins, was in a position to obtain peculiarly favorable terms with respect to the option. [R. 65 and 66.] The securing of the option was not an arm's length transaction as the evidence shows that the same was secured through the services of one Benedict, a cousin of Mrs. Hopkins, and that Benedict was paid by Hole the sum of $125,000.00, for his services in securing the option from Mrs. Hopkins for Hole. [R. 69.] Further, William Hill, who was the agent of Mrs. Hopkins in California, was paid the sum of $35,000.00 in cash by

Hole, and Hole further agreed to give to Hill one-fourth of the shares of stock of the petitioner which Hole was to receive, both considerations being for the services which Hill rendered to Hole. We thus have an out of pocket expense by Hole to Benedict and Hill of the sum of $160,000.00, and the agreement to give Hill one-fourth of the stock which Hole was to receive. In view of these facts, it seems readily apparent that the same was not a "fair sale" and was not an "arm's length" transaction, and the presumption of the Board Member to the contrary is not supported by the evidence.

It is true that the price paid for property, if the same be representative of a fair sale, is convincing evidence as to the value of the property, but such sale must be a fair one and not open to the attacks that obtain in the case at bar.

See:

Walter v. Duffy (C. C. A. 3), 287 Fed. 41;
Phillips v. United States, 12 Fed. (2d) 598;
Heiner v. Crosby (C. C. A. 3), 24 Fed. (2d) 191.

Furthermore, even if the opinion of the Board Member be taken at its full value, the member nevertheless erred in disregarding all the evidence and basing his determination solely upon the sale, for such a sale can never be made the sole basis for the determination of the value of property exclusive of other and more convincing circumstances and facts.

See:

North American Telegraph Company v. Northern Pacific Railway Company (C. C. A. 8), 254 Fed. 417;

Walls v. Commissioner (C. C. A. 10), 60 Fed. (2d) 347.

It is respectfully submitted that the circumstances hereinbefore set forth surrounding the procuring of the option are sufficient to render the price specified therefor of no evidentiary value and that the Board Member erred in basing his decision entirely upon such a sale and of making it the sole basis for his determination of the value of the option in question.

4. Value Claimed by Petitioner Was Established by the Evidence.

The decision of the Board Member cannot find support by reason of the lack of competent evidence introduced on behalf of petitioner for the record is replete with uncontradicted evidence which sustains a value for the option of at least $1,000,000.00.

SUMMARY OF EXPERT TESTIMONY.

Petitioner presented three expert witnesses to testify with respect to values, all of whom were successful and responsible business men of Southern California, and each of whom had had a long and varied experience with respect to oil properties and the dealing in oil properties, both from the standpoint of purchase and sale, during the year 1911 and were familiar with values of oil property and pros-

pective oil properties in the year 1911 and were accordingly qualified to express an opinion as to the value of the option here in question in the year 1911. Each of these three expert witnesses were not giving a retrospective appraisal based upon information, training or expperience which they had acquired since 1911, but were fully qualified in 1911, had the case arisen in that year, to give the identical testimony which they did give when this case was called for trial.

The Witness Burton E. Green.

Burton E. Green has been continuously and actively engaged in the oil business and in the purchase of oil properties in Southern California since 1895. [R. 70.] He purchased and developed many oil properties in Southern and Central California, both individually and on behalf of corporations with which he was actively identified, in and around the year 1911. [R. 79, 81.] He organized several oil companies, including the Associated Oil Company and had been on the Executive Committee of the Associated Oil Company. [R. 80.] While with the Associated Oil Company he had initiated and approved sales of oil lands. He was familiar with the development of oil property in the vicinity of the Hopkins property and had developed part of the McKittrick field during and prior to the year 1911. [R. 82.] In 1910 he was familiar with the property owned by Mrs. Hopkins. [R. 82.] He was informed of the discoveries made on the Hopkins property by Van Slyke and went upon the property and saw the oil croppings and the trench which had been dug on the Hopkins property by Van Slyke in the year 1910. [R. 82.] Witness Green testified that the fair cash value

of the property as of January 25, 1911 was $100.00 per acre [Rr. 87], or approximately $3,100,000.00 for the property. [R. 89.] This value was determined by the witness Green upon the basis of his experience, his knowledge of oil properties and prospective oil properties and what he had paid for them, what other corporations and individuals had paid for them, and his knowledge of the particular property in question. [R. 102.]

On the cross-examination of the witness Green, counsel for the Commissioner asked and received the following replies:

> "Q. At what time did you reach the conclusion in your mind that the land was worth $100.00 per acre? A. Well, before we actually secured it.
>
> Q. Well, what do you mean by saying you secured it? A. When we had the option signed up." [R. 92.]

Thus the opinion as to value expressed by the witness Green was one determined by him in 1911 and before the corporation secured the option in question.

The witness Green further testified that in 1911 he would have paid as high as $100.00 per acre for the Hopkins property if it had been necessary for him and his associates to do so in order to secure the same. [R. 87.] The Board member passes over the testimony of Green with the statement, by inference at least, that it should be discounted because he was an interested party [R 34.] There is nothing in the record to indicate that the witness Green's testimony or opinion was in any way affected by his interest in petitioner, and the presumption is that his testimony was not colored by his interest in petitioner,

especially when the member who heard the case found that the witness was both candid and sincere. [R. 38.] If the witness Green, which we submit he was, is qualified from training, experience and knowledge to express an opinion as an expert, no disqualification rests upon his testimony by reason of the fact that he was associated or connected with the petitioner. The mere fact that the witness Green might be an interested party does not disqualify him nor justify the Board in disregarding his testimony.

Dempster Mill Manufacturing Company v. Burnet, 46 Fed. (2d) 604.

The Witness Harry R. Johnson.

Harry R. Johnson is and was during the year 1911 a consulting petroleum geologist. His academic training was obtained at Stanford University and he received a degree from that University. [R. 113.] Both before and after his graduation from Stanford University the witness Johnson was employed by the United States Government in connection with geological surveys of mineral properties and was so engaged prior to the year 1911. [R. 113.] He made several geological surveys of oil properties in Central and Southern California during the years 1907 and 1908 and submitted a survey, and prepared a map, as well as, a report of the area in which the Hopkins property was located. This report was published prior to 1911 by the United States Government and is an official publication of the latter. [R. 114.] The witness Johnson was familiar with the Hopkins property

in 1910 and 1911. [R. 114.] The witness Johnson, after his resignation from the service of the United States Government in the year 1909, became actively engaged, and has been continuously since that time, engaged in the business of advising prospective purchasers of oil lands as to the value thereof and this was his profession and occupation during the year 1911. [R. 122.] Prior to the hearing of this case by the Board of Tax Appeals, the witness again went on the property with one Van Slyke and verified the discoveries which Van Slyke stated that he made in 1910 and 1911. [R. 123.] The witness Johnson did not, as might be inferred from the opinion of the Board member, for the first time see the Hopkins or Belridge property a few weeks before the trial, but he did go upon the property a few weeks before the trial to confirm facts known to him during the years 1910 and 1911. The witness Johnson on the basis of his scientific education and experience and based upon his experience as an advisor to purchasers of oil lands, his intimate knowledge of the territory and of the values therein and of the discovery of Van Slyke testified that the Hopkins property on January 25, 1911 had a fair market or actual cash value of $2,900,000.00. [R. 127.] In making such an estimate of value, using both his practical and scientific training and experience, the witness Johnson eliminated from his mind entirely the developments of the Belridge property subsequent to 1911. [R. 129.] The witness Johnson further testified that in 1911 he would have recommended to a purchaser that $2,900,000.00 be paid in cash for the property. The witness Johnson further testified from a geological standpoint as well as from the standpoint of a practical oil operator and as a practical

purchaser of prospective oil land, the judgment and conclusion which Burton E. Green and Whittier came to as to the value of this property was more than justified. The member of the Board [R. 30] seeks to discount the value of the testimony of the witness Johnson on two grounds —first, that he visited the property only a short time before the trial of the case, and secondly, that his estimate of value was based entirely upon his geological education and observation and was purely theoretical in character.

The record entirely fails to support either of said conclusions. The record conclusively shows that Johnson was thoroughly familiar with the Belridge property in the year 1911 as well as property adjacent thereto and that he visited the property a short time before the trial of this case to refresh his memory as to the facts and conditions known to him to have existed in the year 1911. The record further refutes the conclusion that the witness based his estimate of value entirely upon his geological training and experience and that it was theoretical in character. It is true that the witness Johnson was a geologist in the year 1911, a competent one, and that he used such training in determining his value, but it is furthermore true and most important to observe that the witness Johnson in the year 1911 and since that date has been engaged in the business of advising prospective oil purchasers as to lands and he testified [R. 122], that numerous sales were made as well as purchases based upon his conclusions and recommendations in the premises, and he testified that he used the sum total of all of his training and experience, both academic and practical, in arriving at his conclusion of value.

The member who heard the testimony of the witness Johnson reached a conclusion at variance with the opinion of the Board member. See dissenting opinion. [R. 47.]

The cross-examination of the witness Johnson did not disturb either his qualifications or estimate of value nor demonstrate that there entered into his opinion erroneous facts or conclusions.

It is respectfully submitted that the Board member erred in his conclusion with respect to the weight to be given to the testimony of the witness Johnson and his opinion with respect thereto is contrary to the evidence.

The Witness W. W. Orcutt.

The witness Orcutt is a geologist of recognized standing who has been connected with the Union Oil Company of California and has been so employed by them since the year 1897. The witness is a graduate of Standford University where he majored in geology. [R. 131.] During the years 1910 and 1911 and prior thereto the witness Orcutt gained familiarity with oil properties and prospective oil properties in Southern California and was familiar with the Belridge property during the year 1911 as well as properties adjacent thereto. The Union Oil Company is a large and representative oil company operating in California and in the years 1910 and 1911 the witness Orcutt advised the Union Oil Company with respect to its purchases and sales of oil properties in California. [R. 132.] The witness Orcutt inspected the property of the Belridge Oil Company shortly before the trial of the case for the purpose of verifying and refreshing his memory with respect to the facts and conditions

known to him to have existed during the years 1910 and 1911, and particularly to verify the discoveries which Van Slyke made during the year 1910. The witness Orcutt gave as his estimate of value that the Belridge Oil property on January 25, 1911, had an actual cash value of $2,700,000.00, and testified that in 1911 he would have recommended to his employer, the Union Oil Company, that they pay the sum of $2,700,000.00 for the Belridge Oil property. [R. 133.]

The member of the Board writing the opinion in this case apparently discounts the testimony of the witness Orcutt on two grounds—first, that his estimate was a theoretical one, giving emphasis to his geological training, and secondly, that he visited the property only a short time before the trial of the case. As in the discussion of the testimony of the witness Johnson, it is likewise true in the instance of the witness Orcutt that both conclusions of the Board are in error. The witness Orcutt was shown to have had practical and actual experience in the vicinity of the Belridge property in the years 1910 and 1911; he was shown to have been the responsible purchasing officer for a large and representative oil company in California in the years 1910 and 1911, and both prior and subsequent thereto, and his opinion of the actual cash value of the Belridge property was not based entirely upon his geological training and experience, but based upon the practical experience which he had had as one having to do practically and actually with the purchase and sale of prospective oil properties during the years 1910 and 1911. [R. 134 and 135.]

The witness Orcutt did not go upon the Belridge property a week or so before the trial of the case for the

purpose of then becoming for the first time familiar with the condition of the property but inspected the property a short time before the trial of the case in order to confirm and refresh his memory with respect to conditions known to him to have existed during the years 1910 and 1911.

The Board member who wrote the opinion in this case has misinterpreted the occasion for the testimony with respect to the visit of both the witness Johnson and Orcutt to this property a short time before the trial. They went upon the property and inspected it to refresh their memory and their knowledge with respect to conditions that existed in 1910 and 1911. Had it been shown that the discoveries of Van Slyke were not actual but were only visionary and potential—the discoveries which he reported to Green and Whittier and upon which they acted, his discoveries might have been discounted as being nothing more than a vision with respect to possibilities, but Johnson and Orcutt testified that it was now possible to verify the discovery which Van Slyke made. They both testified that any practical oil man would have been justified in concluding as did Green and Whittier with respect to the discoveries which Van Slyke made.

There was further introduced Exhibit 5 which shows the dates upon which the oil wells were drilled on the Belridge property and the testimony shows [R. 112] that the first oil well was drilled where Van Slyke had made his discoveries.

It is not shown that in any respect the testimony of the witnesses Johnson or Orcutt should be discredited. The Board member does not attack their qualifications and they are not shown to have had any interest in the out-

come of this proceeding and in fact, the witness Orcutt was in 1911 and is now identified with a competitor of the petitioner corporation.

The testimony of the three experts was consistent, reasonable and stands uncontradicted. Their conclusions were not attacked nor shown to be in error on cross-examination and the Board member who heard their testimony stated that their sincerity, candor and intelligence was unchallenged, and that he was persuaded and convinced thereby. [R. 38.]

In conclusion, therefore, on this aspect of the case, it is submitted that the Board member erred when he disregarded the substantial and uncontradicted evidence of the three experts here in question.

(c) Testimony of the Three Experts Is Supported by Other Evidence.

Petitioner did not offer alone the expert testimony of the witnesses Green, Johnson and Orcutt, but in addition thereto submitted other evidence which it is contended corroborates and supports the expert testimony thus given.

It is not challenged that the Belridge property was an immensely valuable property, neither is it challenged that oil was discovered exactly in the place where Van Slyke had made his discovery. Neither is it challenged that Green and Whittier and the others instrumental in the organization of the corporation acted wisely with respect to the acquisition of the option. [R. 112—Exhibit 5, and R. 122.]

Representative sales and purchases if they be within the territory involved, often prove helpful and are com-

petent to test the accuracy of the testimony of experts. The petitioner in an effort to supply collateral and corroborative evidence of value introduced a purchase made by the Associated Oil Company in the year 1911 of property in the immediate vicinity and comparable, though not as valuable, as the Belridge property. This was a purchase of 23,962 acres of land for a cost price of approximately $1,600,000.00. Certainly such a purchase has to be representative in character. The Associated Oil Company, Exhibit 2, purchased property very near the Belridge property in the year 1911 at a cost of $66⅔ per acre. [R. 73, 75.] The record shows that the property purchased by the Associated Oil Company was similar to the Belridge or Hopkins property but was not as favorably located with respect to producing fields or with respect to anticlines. It is shown that the property purchased by the Associated Oil Company was valuable as prospective oil land and that prior to the purchase thereof in 1910 by the Associated Oil Company, oil had not been discovered on the property. [R. 115—Exhibit 6, R. 172, 129 and 130.] The witness Johnson gives as his conclusion that the Associated Oil property was not as valuable prospective oil property as was the Belridge Oil property and states his reasons in the following language:

> "By maps which I use I am able to locate the property which the Associated Oil Company purchased in 1910 and referred to in Exhibit 2 in evidence in this case. The property which the Associated Oil Company purchased, as before mentioned, was not in as good prospective oil territory as the Belridge oil property.
>
> A. From what I know of the position of that property as you have described it, I would say it

was not in as good territory, and I can give my reasons for that, very briefly.

Q. Do so, please.

A. In my investigation of the general region in December of 1908, in the preparation of Bulletin No. 416, Mr. Arnold and I found that the evidences of oil in the croppings in the foothills of the district to the southwest of the Lost Hills—and when I say 'foothills' I mean the foothills of the Temblar—the evidences of oil were less specific, less definite, that is the oil sands and croppings were less heavily impregnated with oil, that is the oil shales in which they originated, were less heavily impregnated with oil than some of the rocks in the region lying further to the southeast, especially in the region around Gould Hills, which represents the nearest foothill territory to the Belridge property. In this Gould Hills area there are very extensive showings of oil sands and oil shales which were part of the basis that I used in determination of value and that is the reason why I considered the property purchased by the Associated Oil Company, lying generally to the northwest of the Hopkins property as less valuable for oil than the lands which the Belridge Company acquired." [R. 129, 130.]

The dissenting opinion filed in this case [R. 45], concludes that the property of the Belridge Oil Company was more valuable than the property which was purchased by the Associated Oil Company and gives most cogent and satisfactory reasons therefor.

The evidence further shows that shortly after the petitioner corporation was organized and before oil was discovered upon the Hopkins or Belridge property, that one

of the stockholders, Michael J. Connell refused a cash offer from Whittier in the amount of $500,000.00 for his stock in the corporation. While it is true that the sale was not consummated, nevertheless it shows the value attaching to the stock before there was discovery of oil on the property. The offer is testified to by both Connell and Green. Connell owned one-fifth of the stock of the corporation and his holdings, therefore, represented a minority interest. The Board discounts this testimony with the conclusion that the transaction did not sufficiently crystalize to be regarded as more than a trifling indication of value. We admit that standing alone this offer would not be conclusive proof of value but it was introduced in evidence and made a part of the record as one of the further corroborating bits of evidence to show that the value testified to by the witnesses, Green, Johnson and Orcutt was reasonable in all respects.

The evidence also shows that W. J. Hole found it necessary to pay $125,000.00 in cash to a cousin of Mrs. Hopkins to secure his good offices in obtaining the option and that he paid $35,000.00 in cash to an agent of Mrs. Hopkins to assure his good offices to the end that the option might be obtained and that he agreed to give to one Hill, the agent of Mrs. Hopkins, one-fourth of the stock which he, Hole, would receive when the corporation was organized. It is certainly not reasonable to presume or conclude that a businessman would have paid the sum of $160,000.00 in cash and agreed to part with one-fourth of his stock to obtain an option on the property as to which the person obtaining the option was only to pay the sum of $25,000.00, and there would be no certainty with respect to the corporation's exercising the option once it

had secured it. This large expenditure by Hole is but another corroborating circumstance and fact to lend support to the value of the option as given by the expert witnesses. But again this bit of evidence is disregarded by the Board member. It is significant to note that the Board member does not discuss this feature of the testimony or give it any value whatsoever as a supporting bit of evidence to the tesitmony of the experts as to values.

It is respectfully submitted that the additional proof of value herein recounted when combined with the uncontradicted testimony of three qualified experts was certainly substantial evidence which the Board member should not have disregarded and the disregard of the same by the Board member constitutes error.

(d) The Value of the Option Was Determinable by the Evidence.

The Board member writing the opinion suggests that the witnesses testified as to the value of the land but did not testify as to the value of the option. [R. 33.] The testimony in the case is replete with the fact that it was the common custom in purchasing oil lands in Southern California during the year 1911 to acquire them by option. It would seem almost elemental that an option to purchase property would be worth the difference between the price called for in the option and the actual cash value of the property upon which the option is held. If an individual has an option to purchase a dollar by the payment of fifty cents and the question at issue is what is the option worth, and the evidence shows that the dollar is worth one hundred cents, it would seem elemental that the option has a value inuring in it of the difference between

the amount to be paid under the option and the actual cash value of the article covered by the option. This method of computing the value of an option has frequently been used by the Board of Tax Appeals in determining the value of an option. See *Decision of Karl Van Platen v. Commissioner,* 10 B. T. A. 250; *Robert Brunton Studios, Inc. v. Commissioner,* 15 B. T. A. 727; *Belmont Shore Company v. Commissioner,* 21 B. T. A. 714; *Realty Sales Company v. Commissioner,* 10 B. T. A. 1217, and *United Studios, Inc. v. Commissioner,* 15 B. T. A. 737.

In the case of the *Belmont Shore Company v. Commissioner, supra,* the question at issue was the value of an option for which capital stock was issued. The option related to certain land located in the vicinity of Long Beach, California. The option when acquired had cost nothing of value but was assigned to the corporation for a consideration of $60,000.00. The Board found that the stock for which the option was issued had a value of $60,000.00 and of course found that the option itself had a value of $60,000.00. The facts upon which the value of the option in the case at bar could be determined were in evidence and it was not necessary or indeed proper for the witnesses to make mathematical calculations while on the witness stand. The evidence shows that the witnesses were familiar with options and that it was the practice to take options on prospective oil properties. [R. 101.] It was shown that the option in question which is in dispute was an unusually favorable option. [R. 85.] It is submitted that the value of the option is established by the evidence which shows the actual cash value of the property and the price at which the property could be purchased under the terms of the option. For the Board

member to disregard the evidence upon such grounds, if he did so, would be error and would be the injection of a harsh rule beyond the power of the member. See *Chicago Railway Equipment Company v. Blair* (C. C. A.-7), 20 Fed. (2d) 10.

The question of the determination of the value of an asset for invested capital purposes is one which has occurred before the Board with frequency and has also been the subject of decisions of several of the Circuit Courts of Appeal with respect to the decisions of the Board.

The Circuit Court of Appeals for the Eighth Circuit in the case of the *Sioux City Stock Yards Company v. Commissioner*, 59 Fed. (2d) 944, had before it the valuation of certain contract rights for the purpose of determining the invested capital of the corporation for the years 1918, 1919 and 1920. The Board denied the value as claimed by the petitioner, but the Circuit Court in a well reasoned opinion held that the contract should be included in invested capital as contended for by the corporation.

The United States District Court for the Northern District of Ohio in *Service Recorder Company v. Routzahn,* 24 Fed (2d) 875, had before it a decision of the Board of Tax Appeals with respect to the years 1919 and 1920, wherein the Board had sustained the Commissioner of Internal Revenue and refused to permit the corporation to include in its invested capital the cash value of certain patent licenses for which stock was issued. Here again the District Court reversed the decision of the Board and held that the value as contended for had been proven, stating among other things the following:

> "The value of a thing is not always and solely to be determined by precise mathematical computation based upon cash exchanged therefor; and values are sometimes enhanced by faith in the ultimate future of the thing for which those having such faith are willing to hazard their time, money and effort. This is more particularly true in the case of patent licenses, although it may in many cases be applicable to tangibles, such as real estate purchased in anticipation and expectation of development and improvements. Within sound limits, the judgment and expectation of those assuming the risk are elements entering into a determination of value."

The Circuit Court of Appeals for the Sixth Circuit in the case of *Rookwood Pottery Company v. Commissioner,* 45 Fed. (2d) 43, had before it for consideration the determination of the invested capital of the corporation. The Commissioner of Internal Revenue had excluded from invested capital the sum of $16,000.00 represented by stock which had been issued for certain intangibles. Here again the Circuit Court of Appeals reversed the Board and found that the amount of capital stock issued for the intangibles should have been included in the invested capital and that the intangibles were worth a cash value, and stated among other things:

> "We see no reason why the taxpayer did not make its case when it put in proofs clearly and distinctly tending to show this value; and when the proofs so introduced remained unchallenged by contrary proofs or by destructive analysis, it was the duty of the commissioner to decide the issue in accordance with the proof then appearing before him; and it was, we

> think, the duty of the board to take the same view. The Blackstonian 'certainty to a common intent' ought to be sufficient."

See also the decision of the District Court of Massachusetts in *Arizona Mining Company v. Casey,* 32 Fed. (2d) 288, wherein the court allowed a paid in surplus for invested capital purposes of $2,000,000.00

We frequently find the Commissioner of Internal Revenue taking the opposite position to that taken in the case at bar and contending that the decision of the Board is at variance with the substantial evidence if the decision be adverse to him. A striking example is accorded in the case of *Commissioner of Internal Revenue v. Swenson,* 56 Fed. (2d) 544, in which was involved the question of the fair market value of stock received in exchange for certain oil lands. The Board of Tax Appeals determined that the stock did not have a fair market value and consequently the taxpayer should not account for tax upon the receipt of the stock until it was sold by him. The Commissioner appealed the case to the Circuit Court of Appeals for the Fifth Circuit which reversed the decision of the Board wherein the Commissioner successfully contended that the Board had decided the case at variance with the substantial evidence adduced. The opinion of the Circuit Court of Appeals for the Fifth Circuit is particularly helpful in this case with respect to the discussion of prospective and speculative values and it involved the valuation of oil lands. The court among other thing stated as follows:

> "The value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money it would bring

in the market. That value depends largely on expectations as to what may be realized from the property in the future. Ithaca Trust Co. v. United States, 279 U. S. 151, 49 S. Ct. 291, 73 L. Ed. 647. The fact that those expectations are highly speculative may not keep them from being influential in bringing about a willingness to expend money for the acquisition of the property or an interest in it. Though a venture is as speculative as a lottery, a chance or interest in it may be readily saleable for a substantial sum of money. The law does not forbid the recognition of the proved exchangeable value of an asset because of the speculative nature of it. Collin v. Commissioner of Internal Revenue (C. C. A.), 32 Fed. (2d) 753. Furthermore, it did not appear from the evidence that it was mere guesswork to attribute a substantial money value to the shares of stock in question at the time they were received in exchange for an oil and gas lease. At and prior to the date of that exchange, there were extensive explorations and oil developments of nearby lands located on all sides of the tracts covered by the leases held by the corporation. Under the conditions shown by the evidence to have existed at the time those shares were acquired by the taxpayer, it was not to be assumed that those operations had not resulted in the acquisition of knowledge of facts furnishing a substantial basis for a reasonable belief that oil in paying quantities would be found in land included in those leases."

The Circuit Court of Appeals for the Eighth Circuit in *Planters Operating Company v. Commissioner,* 55 Fed. (2d) 583, had before it for decision the value to be assigned to a lease respecting certain hotel property located in St. Louis, Missouri. Capital stock had been

issued for the lease in question. The Commissioner of Internal Revenue had assigned no value for the lease in question and the Board of Tax Appeals upheld the determination of the Commissioner. The court in reversing the Board of Tax Appeals did so on the following grounds:

> "On the hearing before the Board of Tax Appeals, petitioner introduced the testimony of three disinterested witnesses, experienced hotel managers, all of whom testified that there was value in the lease when it was acquired by petitioner in November, 1918, amounting to at least $200,000. They explained how they arrived at this conclusion. Their reasons were couched, not, perhaps, in technical scientific terms, but in the language of laymen. Their testimony was uncontradicted.
>
> "The Board of Tax Appeals gave no weight to this testimony because it considered that it was based upon an erroneous understanding by the witnesses of the real terms of the lease."

(e) Presumption Established by Former Decision of the Board in 11 B. T. A. 127 Is Overcome by the Evidence in the Case at Bar.

The opinion of the Board member in the case at bar seems to be influenced somewhat by a prior decision of the Board reported at 11 B. T. A. 127. It is clear that the prior decision of the Board is not *res adjudicata* with respect to this proceeding and the Board member who wrote the opinion admits the same. [R. 26.] See, also: *Union Metal Manufacturing Company v. Commissioner,* 4 B. T. A. 287.

There is of course a presumption that the former decision of the Board was correct but as pointed out by the member who prepared the dissenting opinion [R. 52], the evidence adduced at the trial of the case at bar, bears but small resemblance to the evidence adduced as a result of which the Board rendered its decision in 11 B. T. A. 127. The evidence presented at the trial of the case at bar is conclusive with respect to the deficiencies in proof pointed out by the Board in the evidence when the case was tried before it and as a result of which it prepared its opinion in 11 B. T. A. 127. We submit that the dissenting opinion so sufficiently answers this contention that it is not necessary to further dwell upon this point.

When the case was tried before the Board resulting in the opinion reported in 11 B. T. A. 127, it was tried at a time when, as one Circuit Court has expressed it, a trial before the Board was merely a preliminary skirmish for the reason that if the taxpayer was dissatisfied with the decision of the Board it could pay the tax, file a claim for refund, bring suit in the United States District Court and try its case over again, and this, in fact, is the exact situation in which the prior decision of the Board now finds itself.

5. It Is Reversible Error for the Board of Tax Appeals to Disregard Competent Relevant Testimony When It is Uncontradicted.

The above heading is quoted from the opinion of the Circuit Court of Appeals for the Eighth Circuit in the case of *Planters Operating Co. v. Commissioner,* 55 Fed. (2d) 583, and is a rule which is well established both by the decision of this Honorable Court and by the Circuit Courts of Appeal of other circuits. This Honorable

Court has not hesitated to require strict compliance with this rule that unimpeached and uncontradicted evidence cannot be disregarded and has reversed the Board upon that ground in the following cases: *Citrus Soap Co. v. Commissioner,* 42 Fed. (2d) 372; *Buena Vista Land & Dev. Co. v. Lucas,* 41 Fed. (2d) 131, and *Royal Packing Co. v. Commissioner,* 22 Fed. (2d) 536.

In the *Citrus Soap Co. v. Commissioner (supra)* this Honorable Court reversed the Board for failure to give proper consideration to the evidence. A witness who was a director, secretary and treasurer of a predecessor corporation testified that the good will acquired by the petitioner from the predecessor company had a value of approximately $50,000.00. The Board, however, disregarded this evidence and ruled that the good will had no value. This court, in reversing the Board, and in referring to the testimony of the witness above mentioned, stated:

> "The foregoing testimony was competent and from a competent source. It was not contradicted by any other testimony. It was not unreasonable or improbable in itself, and, in our opinion, it tended to prove as a matter of law that the good will acquired by the petitioner from its predecessor in interest had a substantial value. What that value was, or the mode or formula by which it should be ascertained, is primarily for the determination of the Board of Tax Appeals."

In *Buena Vista Land & Dev. Co. v. Lucas (supra),* this court stated:

> "It was proved that the land involved in the transaction was worth about $25,000,000 on March 1,

1913, and was worth as much or more at the time of the settlement. The question with which the Board of Tax Appeals concerned itself was the relative market value of the property at the time of its sale, or surrender, and its value on March 1, 1913. The Board announced that it would fix the tax upon the difference between the two.

It was thus the duty of the Board of Tax Appeals to ascertain the value of the property disposed of June 28, 1921, as of the date of March 1, 1913 (section 907(b), 44 Stat., Chap. 27, pp. 9, 107), and fix the same in its findings. This the Board failed to do and for this error its decision must be reversed. Kendrick Coal & Dock Co. v. Commissioner of Internal Rev. (C. C. A.), 29 F. (2d) 559; Pfleghar Hdw. Specialty Co. v. Blair (C. C. A. 2), 30 F. (2d) 614; Chicago Ry. Equip. Co. v. Blair (C. C. A 7), 20 F. (2d) 10. * * *."

The rule has been applied in other circuits in the following cases: *Conrad & Co. v. Commissioner* (C. C. A. 1), 50 Fed. (2d) 576; *Bonwitt Teller & Co. v. Commissioner* (C. C. A. 2), 53 Fed. (2d) 381; *Pflegher Hardware Specialty Co. v. Blair* (C. C. A. 2), 30 Fed. (2d) 614; *Boggs & Buhl, Inc. v. Commissioner* (C. C. A. 3), 34 Fed. (2d) 859; *Pittsburgh Hotels Co. v. Commissioner* (C. C. A. 3) 43 Fed. (2d) 345; *Nichols v. Commissioner* (C. C. A. 3), 44 Fed. (2d) 157; *Chicago Rwy. Equip. Co. v. Blair* (C. C. A. 7), 20 Fed. (2d) 10; *Planter's Operating Co. v. Commissioner* (C. C. A. 8), 55 Fed. (2d) 583; *Dempster Mill Mfg. Co. v. Burnet* (Ct. of App. D. C.), 46 Fed. (2d) 604.

In *Nichols v. Commissioner (supra)* the court summarized the testimony and stated:

> "This testimony overcame the presumption arising from the determination of the Commissioner. The burden then shifted to the Commissioner to support his determination by evidence, and this he did not do nor attempt to do, and accordingly his determination cannot stand. United States v. Rindskopf, 105 U. S. 418, 26 L. Ed. 1131; Thompson Pottery v. Routzahn (D. C.), 25 F. (2d) 897; Flannery v. Willcuts (C. C. A), 25 F. (2d) 951; Briggs Manufacturing Co. v. United States (D. C.), 30 F. (2d) 962.
>
> The Board of Tax Appeals disregarded all the positive and affirmative evidence in the case. Its own findings are not predicated upon any substantial evidence, and therefore its redetermination is set aside, the determination of the Commissioner reversed, and the income tax returns of the petitioner approved."

In *Dempster Mill Mfg. Co. v. Burnet, supra,* the Board disregarded the testimony of an expert witness on the ground that he was an interested witness. Upon reversing the Board the court stated: "We think it was error to disregard the testimony of this witness inasmuch as it stands uncontradicted."

The instant case comes directly within the rule of the above cited cases. There can be no doubt that the witnesess were qualified. Their testimony was reasonable and consistent and was uncontradicted. There is no reason whatsoever for discrediting their testimony for two of them were disinterested parties and there is nothing to indicate that the third witness' interest in any way affected

his testimony, and interest alone is not sufficient to justify the disregard of his testimony. *Dempster Mill Mfg. Co. v. Burnet, supra.* The Board specifically states in its opinion that it has not relied upon its own knowledge and experience. [R. 37.]

In addition to the foregoing, in the instant case, there were three witnesses, while in the *Citrus Soap Co. v. Commissioner, supra,* and the *Dempster Mill Mfg. Co. v. Burnet, supra,* there was only one. Furthermore in the instant case the Board member who conducted the hearing was highly impressed with the candor, earnestness, sincerity and intelligence with which the witnesses testified. [R. 38.] This fact alone should be sufficient to make the disregarding of the testimony by the member of the Board reversible error, *Jewett & Co. v. Commissioner* (C. C. A.-2), 61 Fed. (2d) 471.

It is submitted that the disregard by the Board member of competent, relevant and uncontradicted testimony was reversible error.

CONCLUSION.

In conclusion it is respectfully submitted that the decision of the Board of Tax Appeals is not supported by substantial evidence.

That it was reversible error for the Board of Tax Appeals to disregard the competent and uncontradicted testimony of the witnesses.

That the evidence conclusively establishes the actual cash value of the option to be at least equal to the value of the stock issued therefor or $1,000,000.00.

Wherefore, it is respectfully submitted that the decision of the Board should be reversed and that such other and further relief be granted as this Court deems proper.

Respectfully submitted,

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No. 7103

In the United States Circuit Court of Appeals for the Ninth Circuit

BELRIDGE OIL COMPANY, A CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

SEWALL KEY,
JOHN MacC. HUDSON,
Special Assistants to the Attorney General.

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The only previous opinion in the present case is that of the United States Board of Tax Appeals (R. 16–56), which is reported in 26 B.T.A. 810.

JURISDICTION

This appeal involves income and excess-profits taxes for the year 1921 in the amount of $45,293.85 and is taken from a decision (order of redetermination) of the Board of Tax Appeals entered August 17, 1932 (R. 56). The case is brought to this Court by petition for review filed November 15, 1932 (R. 57–62), pursuant to Section 1001–1003 of

the Revenue Act of 1926, c. 27, 44 Stat. 9, 109, 110, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 286.

QUESTION PRESENTED

Whether the Board of Tax Appeals erred in finding that the actual cash value of an option for the purchase of land did not exceed $25,000, the amount paid therefor, at the time paid in to the petitioner for stock, the only evidence of a higher value being the opinions of witnesses of the value of the land itself.

STATUTE INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227:

> SEC. 326. (a) That as used in this title the term "invested capital" for any year means (except as provided in subdivision (b) and (c) of this section):
>
> (1) Actual cash bona fide paid in for stock or shares;
>
> (2) Actual cash value of tangible property, other than cash, bona fide paid in for stock or shares, at the time of such payment, but in no case to exceed the par value of the original stock or shares specifically issued therefor, unless the actual cash value of such tangible property at the time paid in is shown to the satisfaction of the Commissioner to have been clearly and substantially in excess of such par value, in which case such excess shall be treated as paid-in surplus; * * *

(3) Paid-in or earned surplus and undivided profits; not including surplus and undivided profits earned during the year; * * *

STATEMENT OF FACTS

The material facts are found by the Board of Tax Appeals and may be summarized as follows:

The petitioner is a California corporation, with its principal place of business at Los Angeles (R. 17), and was organized on January 25, 1911, for the purpose of acquiring the interests of certain individuals under an option for the purchase of land (R. 24). The land involved consisted of 30,845.96 acres in one parcel, situated in Kern County, California, between McKittrick and Lost Hills and was owned by Emily B. Hopkins of New York, who also owned a 55 percent interest in the Stearns Rancho Company, which originally owned and was engaged in the sale of approximately 300,000 acres of land in Southern California (R. 17–18).

In 1910 and 1911 the resident sales agent at Los Angeles for the Stearns Rancho Company was W. J. Hole (R. 17), who also purchased and sold property on his own account from time to time, usually in 1910 and 1911 effecting purchases by means of options for stated periods (R. 18). By reason of his success as agent for the Stearns Rancho Company, Hole in 1910 was able to obtain from Mrs. Hopkins for $1 and other valuable con-

siderations a written option for one year to purchase at $20 per acre the 30,845.96 acre tract in Kern County, with which property he had been familiar for six or eight years prior to 1910 (R. 18–19). The suitability of the land for agricultural purposes and the prospects of oil thereon, which were thought good because of the producing oil fields on both sides of the property, induced Hole to acquire the option (R. 19).

William Van Slyke, who had been engaged in the oil business since 1894 as a driller, superintendent of drillers, and prospector, was acquainted in 1910 with the Kern County tract of land here involved. He made several visits to the property in 1910 between June and December, the first for the purpose of locating boundary stakes, when he noticed oil structure and found oil sands on the property. On subsequent visits for the purpose of prospecting, he dug a surface trench extracting samples of the formation which he tested, and also dug a 14-foot hole which disclosed black oil sand, shale, dried out oil sand, and live oil sands, increasing in richness with depth. Concealing his discovery by covering the hole with plank, dirt, and brush, Van Slyke endeavored to acquire some of the land, which on January 5, 1911, was virgin territory for oil purposes other than as disclosed by Van Slyke's activities. He disclosed his findings to Max Whittier, a recognized expert in oil matters, who visited the property with him some time in December, 1910.

Whittier also was interviewed by Hole, whose efforts to interest others in the property under option to him until then had been unsuccessful, and being informed of the location and size of the property and Hole's option Whittier announced that he would go into the project. Thereafter Whittier conveyed the information in his possession to Burton E. Green, an oil operator of wide experience since 1895, who, accompanied by Van Slyke and Whittier, visited the property some time prior to January, 1911, and saw the oil croppings reported and the trench dug by Van Slyke, and also noted the similarity of the oil croppings there to those in the Lost Hills field on the northeast. This discovery was carefully guarded by these men and divulged to no one except M. J. Connell and Frank Buck who became original stockholders of the petitioner when incorporated (R. 19–21).

Hole, accompanied by Whittier, went to Green's office and after some discussion offered to sell the property at $33⅓ an acre and a one-fifth interest in the corporation later to be formed. Green agreed to take over the option on those terms, if the option could be redrawn to suit his requirements, which related particularly to the insertion of a provision whereby at least two wells, and as many more as desired, could be drilled within a year before the option had to be exercised. Hole was not advised of Van Slyke's discovery nor were Green and his associates advised of the terms of the

1910 option held by Hole. After three or four months' negotiation and delay, and considerable difficulty, entailing the expenditure of $125,000 to a nephew of Mrs. Hopkins and $35,000 and one fourth of Hole's stock in the company to Mrs. Hopkins' agent, a suitable option was agreed upon. Under date of January 5, 1911, Hole, acting for Green, who furnished the consideration, entered into an agreement with Emily B. Hopkins, whereby he paid her $25,000 for the option to purchase within one year from January 1, 1911, the Kern County tract of 30,845.96 acres, subject to certain pipe line, telephone, and telegraph rights and a certain lease for grazing purposes, for $33.33 per acre or a total sum of $1,028,198.67, with the provision that upon the exercise of the option within the year as specified the $25,000 paid for the option should be applied to the purchase price of the land (R. 21–23).

Under the option the holder thereof was entitled to drill four proper and suitable wells for the discovery of oil and gas, of which two were to be commenced as soon after the date of the option as equipment could be installed and water provided and two more within sixty days after completion or abandonment of the first two, using the same equipment, with the further privilege of drilling as many more wells as desired within the time specified for the four wells. It was provided that if

the first two wells proved dry and the latter two or either of them were not completed by January 1, 1912, the option to purchase should be extended until thirty days after the finding of oil and gas in and the completion of the last two wells, or the abandonment thereof. These provisions of the option, allowing the holder thereof to drill wells before being required to exercise the option to purchase, were the requirements which Green and Whittier, in their discussions with Hole and negotiations for the option, insisted upon before they would agree to take it over. Without these provisions Green and Whittier would not have proceeded with the transaction (R. 23).

On January 25, 1911, the option was assigned to the petitioner in consideration of $10 and other valuable consideration (R. 23). On the same date, the Board of Directors of petitioner at their first meeting accepted the proposal of Hole to assign the option to petitioner in consideration of the issuance to him of 999,995 shares of its stock and on January 26, 1911, there was issued to Hole of the total issue of 1,000,000 shares of stock, par value $1 per share, 999,995 shares, which pursuant to the prior understanding of the parties were divided between Hole, Green, Connell, Whittier, and Buck, and 25,000 shares placed in trust for one Henderson, the proposed general manager of the company, and such transfers and division were recorded in

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the books of the petitioner on February 1, 1911 (R. 24–25).

The first and second wells were begun on March 11 and March 18, 1911, respectively, and were completed on April 21 and April 7, 1911, respectively. Oil sand was struck in the first well at between 445 and 480 feet and in the second well at between 350 and 360 feet. Thirty days after completion the first well produced 100 barrels of oil a day, 25.3 degrees Baumé and the second well produced 100 barrels of oil a day, 26.5 degrees Baumé (R. 25).

The respondent has excluded from the petitioner's invested capital for 1921 "stock discount $974,995", representing that portion of the par value of capital stock, $999,995 issued in 1911 for the option upon the Hopkins property, in excess of the $25,000 originally paid therefor by Hole and his associates (R. 25).

SUMMARY OF ARGUMENT

The statute defines invested capital as the actual cash or the actual cash value of tangible property paid in for stock and paid in or earned surplus and undivided profits. The petitioner seeks to include in invested capital for 1921 the alleged value of an option for the purchase of land at the time paid in for stock January 25, 1911, claiming a value of $1,671,801.40. The option was obtained from the owner of the property by the promoters and

stockholders of the petitioner on January 5, 1911, for the sum of $25,000. The petitioner failed to sustain the burden of establishing that the option at the time paid in for stock had an actual cash value in excess of $25,000 cash paid therefor by its stockholders a few days prior thereto. The petitioner relied principally upon the opinion valuation of three witnesses to prove the value claimed. The Board of Tax Appeals is not bound to accept the opinions of experts, but may reject the same and determine the fact for itself from all the evidence in accordance with its own judgment and in the light of its own general knowledge and experience. In addition to the opinions of the experts there was in evidence the option agreement itself as well as the determination of the Commissioner, which was *prima facie* correct. The option agreement was entered into by parties fully informed of the facts in an arm's length transaction and the cash consideration paid therefor is the best evidence of the actual cash value of the option. The Board of Tax Appeals was fully warranted in refusing to adopt the opinions of the petitioner's witnesses. The evidence, moreover, amply supports the finding of the Board that the option had no value in excess of the $25,000 cash paid therefor. Under the settled rule that finding should not be disturbed.

ARGUMENT

The finding of the Board of Tax Appeals that the option which was paid in to petitioner for stock had no value at that time in excess of $25,000, the amount paid therefor by certain individuals, is supported by evidence and should be sustained. The option may be included in invested capital to the extent of the cost thereof, $25,000, and no more

The petitioner seeks to include in invested capital for 1921 the alleged value of the option for the purchase of prospective oil property which was paid in to it for $999,995 par value stock. It is contended that the actual cash value of the option at the time paid in was $1,671,801.40. The petitioner originally claimed that the option had an actual cash value at the time paid in of $1,028,198.60 and should be included in invested capital to the extent of the par value of the stock issued therefor (R. 7), but at the conclusion of the hearing the petitioner amended its petition to claim, as invested capital in addition to the par value of the stock, a paid-in surplus in the amount of $671,806.40 on account of the alleged excess value of the option (R. 143). The respondent contends, and the Board of Tax Appeals held, that the actual cash value of the option on January 25, 1911, when paid in to petitioner for stock, was not more than $25,000, the amount paid therefor on January 5, 1911, which amount may be included in invested capital on account of the option and no more.

Section 326 (a), so far as material, defines invested capital as the actual cash paid in for stock,

the actual cash value of tangible property paid in for stock at the time of such payment, and paid in or earned surplus and undivided profits. Under this statutory definition, the satisfaction of which is essential to the inclusion of any particular item in invested capital, tangible property paid in for stock may be included only to the extent of its *actual cash value at the time paid in* and in no case at more than the par value of the stock issued therefor, unless it is shown to be clearly and substantially in excess thereof in which event the excess may be treated as paid-in surplus. The manifest purpose of the statute is to limit the invested capital, which measures the normal return allowable as a deduction from income before imposition of the excess-profits tax, to money or money's worth *actually invested* in the business by the stockholders or by the corporation itself through application of its excess earnings. *La Belle Iron Works* v. *United States,* 256 U.S. 377; *Golden Cycle Corporation* v. *Commissioner,* 51 F. (2d) 927, 930 (C.C.A. 10th). The petitioner, therefore, is entitled to include the option in its invested capital only to the extent of its *actual cash value* at the time paid in for stock, January 25, 1911.

The actual cash value of the option when paid in to the petitioner for stock was the question before the Board of Tax Appeals, manifestly a pure question of fact. The Board, upon consideration of all the evidence, concluded that the actual cash value

of the option at the time paid in was $25,000, the amount paid therefor by the promoters of petitioner a few days before its organization, as determined and allowed by the respondent. Under the doctrine often laid down by the Circuit Courts of Appeals and sanctioned by the Supreme Court, the finding of the Board may not be disturbed if there is any evidence to sustain it (*American Sav. Bank & Trust Co.* v. *Burnet,* 45 F. (2d) 548 (C.C.A. 9th); *Simons Brick Co.* v. *Commissioner,* 45 F. (2d) 57 (C.C.A. 9th); *Fidelity Title & Trust Co. et al., Executors,* v. *Commissioner* (C.C.A. 3d), decided March 14, 1933, not officially reported but found in 333 C.C.H., p. 8579; *Saxman Coal & Coke Co.* v. *Commissioner,* 43 F. (2d) 556 (C.C.A. 3d); *Phillips* v. *Commissioner,* 283 U.S. 589; *Gloyd* v. *Commissioner* (C.C.A. 8th), decided March 2, 1933, not officially reported but found in 333 C.C.H., p. 8494; *Uncasville Mfg. Co.* v. *Commissioner,* 55 F. (2d) 893 (C.C.A. 2d), certiorari denied, 286 U.S. 545), and it must be remembered that the determination of the Commissioner is *prima facie* correct, the burden being upon the petitioner to establish error and prove all facts essential to a correct determination.

To support the value claimed, the petitioner offered and relied principally upon the opinions of three witnesses, one of the promotors and stockholders of the petitioner and two experienced geologists (R. 79–103; 112–143). Each of these

witnesses gave his opinion of the value of the property, which was in excess of the price stipulated in the option to be paid by petitioner for the land (R. 89, 127, 133). The difference between the smaller of these opinion valuations, $2,700,000, and the purchase price named in the option, $1,028,198.67, the petitioner claims is the actual cash value of the option.

The rule, long ago laid down by the Supreme Court, that a trial tribunal is not bound by and need not accept the opinions of experts, as to value of property or other facts, even if there is no contradictory testimony, and is not only free to, but must, exercise its own judgment and reach a conclusion from all the evidence (*Head* v. *Hargrave,* 105 U.S. 45, 47–49; *The Conqueror,* 166 U.S. 110) is equally applicable to the Board of Tax Appeals, which exercise judicial functions. The Circuit Courts of Appeals repeatedly have held that the Board is not concluded by the opinions of experts, but giving them such weight as in its judgment they are entitled to, the Board should and must form its own conclusion and determine for itself the fact from all the evidence in accordance with its own judgment. *Fidelity Title & Trust Co., et al., Executors,* v. *Commissioner, supra; Saxman Coal & Coke Co.* v. *Commissioner, supra; Gloyd* v. *Commissioner, supra; Keystone Steel & Wire Co.* v. *Commissioner,* 62 F. (2d) 458 (C.C.A. 7th); *Grand Rapids Store Equipment Corporation* v. *Commis-*

sioner, 59 F. (2d) 914 (C.C.A. 6th); *Uncasville Mfg. Co.* v. *Commissioner, supra; Tracy* v. *Commissioner,* 53 F. (2d) 575, 577 (C.C.A. 6th), certiorari denied, 287 U.S. 632; *Anchor Co.* v. *Commissioner,* 42 F. (2d) 99, 100 (C.C.A. 4th); *Gessell* v. *Commissioner,* 41 F. (2d) 20, 22 (C.C.A. 7th); *Am-Plus Storage B. Co.* v. *Commissioner,* 35 F. (2d) 167, 169 (C.C.A. 7th).

In *Fidelity Title & Trust Co. et al., Executors,* v. *Commissioner, supra,* it was said (p. 8580):

> Much of the petitioners' contention is to the effect that the Commissioner underestimated the value of real estate owned by the Consolidated Gas Company and that the opinions of the experts who testified as to its value should have been accepted. It was pointed out in *Saxman Coal and Coke Co.* v. *Commissioner, supra,* that the Board of Tax Appeals is not bound by opinion evidence of experts but is at liberty to reject these opinions and form its own opinion on the facts presented.

In *Uncasville Mfg. Co.* v. *Commissioner, supra,* the Second Circuit Court of Appeals, sustaining the refusal of the Board to adopt the opinion valuation of property by an officer of the taxpayer, said (pp. 897–898):

> A jury need not accept the opinions of even a bevy of disinterested witnesses * * *; nor need a judge * * *. It is hard to see why the Board should be more constrained; it acts as a judicial body. * * *

> Perhaps when the issue is of facts of observation, where the truth depends only upon recollection and honesty, it may be otherwise, but of all things value is the most uncertain. Opinions about it are prophecies, whose truth cannot ordinarily be verified save where the property is in fungibles, and there is a concourse of buyers and sellers. As to property like that at bar the best opinion is little more than a guess. These factories were in the country, situated on streams, dependent in part upon them for power. They had their history, their good will, their own individuality; it was a most difficult matter even with disinterested evidence to arrive at their equivalent in money. * * *
>
> The company bore the risk of persuading the tribunal of its own selection. It has failed, and that failure is due to the inevitable unreliability of the evidence which it presented. * * *

Similarly, the Fourth Circuit Court of Appeals in *Anchor Co.* v. *Commissioner, supra,* confirming the Board's rejection of opinion testimony of value and approval of the Commissioner's determination, had this to say (p. 100):

> It is said that the Board had before it no evidence, except the testimony of Franklin, as to market value on March 1, 1913; but this ignores the determination of the Commissioner, which was before the Board, and, as shown above, was prima facie correct.

> And even if this were not true, we do not think that the Board, on the question of valuation, is to be held bound by the opinion of experts. Such evidence is competent, but it is not to be blindly followed. It should be weighed by the Board in the light of the other facts developed in the case and of the general knowledge and experience of the members, and is by them to be given only such weight as in the light thereof may seem to be just and reasonable. * * *

The controlling principle is concisely stated by the Eighth Circuit Court of Appeals in *Gloyd* v. *Commissioner, supra* (p. 8496):

> Of course there must be substantial evidence to support the finding of the Board or it cannot stand, but we do not understand the law to be that the Board is compelled to accept the evidence of experts as to value of property. It is within its province to accept such evidence in toto, in part, or not at all. Its weight is with the trial Board, and its worth is for its sound judgment to determine. It is not required to surrender its judgment to the judgment of experts. It is the one to determine the facts—not the experts.

The Seventh Circuit Court of Appeals in *Am-Plus Storage B. Co.* v. *Commissioner, supra,* speaking of purely opinion evidence, aptly pointed out (p. 169):

> Such opinions, as is usual, were expressed with respect to the point upon which the

> Board was required to pass. Such evidence, while competent and often exceedingly helpful, is not considered binding, in the sense that a tribunal before whom it is adduced is required to accept it, where same is contrary to the tribunal's own judgment of the result of the facts upon which the opinion evidence is based. * * *

Planters' Operating Co. v. *Commissioner,* 55 F. (2d) 583 (C.C.A. 8th); *Bonwit, Teller & Co.* v. *Commissioner,* 53 F. (2d) 381 (C.C.A. 2d); *Nichols* v. *Commissioner,* 44 F. (2d) 157 (C.C.A. 3d); *Pittsburgh Hotels Co.* v. *Commissioner,* 43 F. (2d) 345 (C.C.A. 3d); *Boggs & Buhl* v. *Commissioner,* 34 F. (2d) 859 (C.C.A. 3d), cannot be interpreted as holding, contrary to the cases cited above, that the Board of Tax Appeals is bound by opinion testimony. In each of those cases the court, recognizing the rule that the Board may disregard expert testimony, held only that the finding of the Board must be supported by some evidence. The fair deduction to be drawn from those cases is that the Board is not bound to adopt the opinions of experts, even if there be no other evidence in the case, but if it rejects the same it cannot by mere conjecture make an arbitrary finding unsupported by any evidence. See *Gloyd* v. *Commissioner, supra.* Similarly, in *Citrus Soap Co. of California* v. *Lucas,* 42 F. (2d) 372 (C.C.A. 9th), it was held only that testimony of a qualified witness was competent evidence and not that the Board of Tax

Appeals was bound to accept the opinion of the witness, the Court particularly pointing out that it was for the Board to determine the fact.

Substantially the only evidence introduced by the petitioner to support the alleged value of the option consisted of the opinions of three witnesses. William G. Van Slyke, one of the original parties interested in the property covered by the option here involved and a stockholder of the petitioner, testified that upon a visit to this property in 1910 he noticed oil structure and on a subsequent visit dug a fourteen-foot hole thereon which disclosed oil sand, which he tested and found to be live oil sand (R. 76–78). Burton E. Green, an experienced oil man and the responsible party in the negotiations and the one who furnished the cash paid for the option on the property in question and who was advised of Van Slyke's discovery (R. 79–83), testified that in his opinion the property covered by the option was worth $100 per acre or approximately $3,100,000 for the tract (R. 87, 89). Green had been on the property and viewed the formation and the outcroppings of apparent oil structure, which was similar to that of the Lost Hills oil field in the Northeast (R. 82). He based his opinion principally upon the price he said had been paid for property in the Lost Hills section (R. 94), but he did not know by whom or to whom such sales had been made and apparently his information of such sales amounted to nothing more than "the talk

at the time'' (R. 101). Moreover, it appears that at the time of the sales in the Lost Hills section such property was either proven oil land or just off the producing oil land (R. 94–95, 101), while the property covered by the option here in question was virgin territory (R. 94). Harry R. Johnson, a geologist who had made a number of surveys of oil properties in California and in the vicinity of the property here involved, and who was familiar with this property in 1910 and 1911, testified to the similarity of this property and the Lost Hills fields (R. 112–115), but he visited this property for the purpose of obtaining specimens and samples and making tests only about two weeks before the date of the hearing of this case (R. 125). He testified that in his opinion the actual cash or fair market value of the property covered by this option was $2,900,000 (R. 129), basing his opinion upon methods he said were used by geologists in determining values of prospective territory (R. 127), which methods, however, he did not undertake to explain. W. W. Orcutt, another geologist, having heard the testimony of the other witnesses as to the contour and topography of this property and the oil formation or structure, and having been on the property about a week prior to the hearing of this case, confirmed the testimony as to the contour and topography of the land and testified that in his opinion the fair market value of the property was $2,700,000 (R. 131–133). He based his opinion

upon the similarity of the outcroppings and structure of his property and the several oil fields in Southern California, from which it appeared that the property would make a good oil field (R. 134).

Petitioner also offered in evidence the minutes of the meeting of the Associated Oil Company held on September 6, 1910, evidencing the purchase by that company in July 1910 of certain property in Kern County at a net cost of $66⅔ per acre (R. 73–75, 156–166). No evidence was offered, however, to show that the two properties were comparable. It was not shown whether the property purchased was virgin or proven oil territory.

In addition to the foregoing, the record discloses that the option here in question was obtained from the owner, Emily B. Hopkins, through W. J. Hole, who was the agent for a real estate company, in which Mrs. Hopkins held the majority interest. Hole also held a year's option to purchase this property at $20 per acre, which he had obtained without consideration in May 1910, but until he interviewed Green, Whittier, and Van Slyke he had been unable to interest others in the property (R. 64–68). Although Hole was not advised of Van Slyke's findings on the property until after the option of January 1911, here involved, for the purchase of the property at $33⅓ an acre had been agreed upon, he knew that the land presented very good prospects for oil and that it lay between two producing oil fields (R. 67, 70–72). The option

agreement was in evidence (R. 144–155) and its terms clearly disclose that the owner of the property, Mrs. Hopkins, was fully cognizant of the oil prospects of the land and of the purpose of the option (R. 148–153). It also was testified that the property in question, lying between, and within six to nine miles of, proven oil fields, was decidedly similar to one of the proven fields (R. 115) and that a practical oil man viewing the property would naturally conclude that it was oil land (R. 124). It also was testified that other oil companies had had scouts over the property (R. 98), yet there is no evidence of any effort being made to acquire this property and indeed W. J. Hole had been unsuccessful in his endeavors to interest others in the project.

Moreover, the option agreement was not finally consummated until after extended negotiations of three or four months with the owner (R. 70, 83), and then Green and his associates would not accept the option until a provision was inserted allowing them to drill as many wells as they desired within the period of the option for the purpose of discovering oil before they should be required to purchase the property on the terms agreed upon, or in other words to prove the property as oil producing (R. 83, 149–152). Thus it would appear that Green and his associates were not so sure at the date of the option of the value of the property as an oil producer as to obligate themselves to pur-

chase it at the stipulated price, they insisted upon definitely establishing the fact before assuming so large an expenditure as more than a million dollars. Green and his associates, as practical oil men, knew there could be no reasonable certainty that the property would prove a productive field. As said by the Board of Tax Appeals in the prior proceeding involving the identical question here presented, for earlier years (11 B.T.A. 127, 136):

> Oil and gas are of a fugitive nature. They hide in the deep recesses of the earth where the eye of man may not penetrate. The sorry experience of thousands of investors proves that their exact location may seldom, if ever, be divined with precision and certainty. Not every oil seepage or outcrop of oil sand indicates the presence of oil in profitable quantities. A few yards only may separate the gusher from the dry hole. Of a truth, the test of an oil property is the drilling thereof.

In this connection compare also, *Coalinga-Mohawk Oil Co.* v. *Commissioner* (C.C.A. 9th), decided April 3, 1933, not officially reported but found in 333 C.C.H., p. 8671. Mrs. Hopkins, and anyone else who might have been interested, obviously knew that the property was located near producing oil fields and must have been cognizant of such prospects for oil as the land presented, and accordingly possessed as much knowledge of the value of the land as Green and his associates. It seems plain

that the option agreement was entered into between parties, equally informed, in an arm's length transaction and the consideration therefor, $25,000, was mutually agreed upon as the fair value of the option to purchase at the specified price. The consideration thus fixed by the parties themselves, after months of negotiation, would seem to be the best evidence of the actual cash value of the option paid in to the petitioner only a few days after consummation of the agreement. Cf. *Thomas A. O'Donnell* v. *Commissioner* (C.C.A. 9th), decided April 8, 1933, not officially reported but found in 333 C.C.H., p. 8692.

In the light of these facts, it is submitted, the Board of Tax Appeals was amply justified in refusing to adopt the opinions of petitioner's witnesses as to the value of the option. Of all things value is the most uncertain and opinions about it are little more than prophecies. *Uncasville Mfg. Co.* v. *Commissioner, supra.* It is not accurate to say that the Board had before it no other evidence than the opinions of the witnesses. The Commissioner's determination, which is *prima facie* correct, was before the Board and also the option agreement, as well as the testimony relative to the character of the property. See *Anchor Co.* v. *Commissioner, supra.* All the facts upon which the witnesses purported to base their opinions were in evidence and not only was the Board competent, but it was the Board's duty to form its own opinion and make a

finding of the value of the option from all the facts in accordance with its own judgment. The evidence, we submit, abundantly supports the finding and conclusion of the Board.

CONCLUSION

The decision of the Board of Tax Appeals is correct and should be affirmed.

Respectfully,

SEWALL KEY,
JOHN MACC. HUDSON,
Special Assistants to the Attorney General.

MAY 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

No. 7111

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

G. D. THOMPSON, as Receiver of the Twin Falls National Bank, Twin Falls, Idaho,

Appellant,

vs.

COMMON SCHOOL DISTRICT NO. 54, in the County of Twin Falls, State of Idaho,

Appellee.

G. D. THOMPSON, as Receiver of the Twin Falls National Bank, Twin Falls, Idaho,

Appellant,

vs.

COMMON SCHOOL DISTRICTS NOS. 32, 36, 47, 59, and 62, in Twin Falls County, State of Idaho,

Appellees.

Transcript of the Record

Upon Appeal from the District Court of the United States, for the District of Idaho, Southern Division.

CAXTON PRINTERS, CALDWELL 43187

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IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION

Common School Districts Nos. 32, 36, 47, 59, and 62, in the County of Twin Falls, State of Idaho,

Plaintiffs,

vs.

G. D. Thompson as Receiver of the Twin Falls National Bank of Twin Falls, Idaho.

No. 1787

BILL IN EQUITY

Filed October 31, 1932

For their several causes of action herein the plaintiffs state:

COUNT I.

1. That the plaintiff Common School District No. 32 is and at all of the times hereinafter stated was a regularly organized and existing Common School District in the County of Twin Falls in the State of Idaho, and as such was at all times and now is a body corporate, and by and in its name its Trustees bring this action for its use and benefit.

2. That the Twin Falls National Bank was at all of the times hereinafter mentioned, up to the 23rd day of November, 1931, a National Banking Association, duly organized and existing under and pursuant to the laws of the United States.

3. That on the 23rd day of November, 1931, the said Twin Falls National Bank became insolvent and on said date ceased doing business as a bank and has not at any time since that date conducted the business for which it was organized.

4. That immediately after its failure Raymond H. Haase was duly appointed and became the lawfully acting receiver of the said Twin Falls National Bank for the purposes of its liquidation and continued to act in that capacity until after the 4th day of February, 1932; and as such receiver took into his possession all of the money and other assets of said bank on hand at the time it ceased doing business.

5. That subsequent to the 4th day of February, 1932, the defendant G. D. Thompson became and now is the lawfully acting receiver of the said Twin Falls National Bank in the place and stead of the said Raymond H. Haase.

6. That on the 18th day of January, 1929, the plaintiff, Common School District No. 32, had on hand and to its credit in the hands of the County Treasurer of Twin Falls County, Idaho, acting as

the treasurer of said School District, funds in excess of the sum of One Hundred and Sixty Dollars, which funds were subject to withdrawal only upon a warrant to and upon the treasurer of said county, acting as the treasurer of said School District, lawfully issued by the county auditor of said County upon the presentation and delivery to said auditor of the order or orders of said School District signed by the Clerk of the board of trustees of the School District and also signed by the chairman of the board, or, in the absence of the chairman, by the other members of the board.

7. That on the 18th day of January, 1929, the said Twin Falls National Bank caused the county auditor of said Twin Falls County to issue and deliver to it a warrant on the county treasurer of said county, calling for the payment by said treasurer from the funds of said School District of the sum of One Hundred and Sixty Dollars, said warrant being numbered 27939; that on the 19th day of January, 1929, the said Bank presented said warrant to the county treasurer of said county and by virtue thereof received from said treasurer from the funds of said School District the said sum of One Hundred and Sixty Dollars.

8. That neither prior to nor at the time of the issuing of said warrant, nor at the time of the payment thereof, nor at the time said Twin Falls

National Bank received the money thereon had said Bank sold or furnished to the said School District any supplies, materials or other property, or thing of value, neither had it furnished or rendered any services to or for the plaintiff, the said Common School District No. 32, and said School District was not at said times or at any time indebted to said Bank in the amount of $160 or any other sum; that said warrant was not issued nor was the same paid to discharge in whole or in part any debt or obligation then due or owing to said Bank from said School District.

9. That said warrant was by the said Twin Falls National Bank so obtained without presenting or delivering to said County Auditor any order or orders issued by the said School District No. 32, or in its behalf or by its authority, or any signed by the clerk of the board of trustees of said District or by its chairman or any of its members; that said school district has not and had not at any time issued or caused to be issued or authorized the issuance of any order or orders for the warrant so obtained by the said Bank; that no order for such warrant was at any time signed by the clerk of the board of trustees of said school district or by the chairman of said board or by any of the other members thereof; that the warrant so obtained by the said Bank from the said county auditor was illegally and wrongfully issued and by said Bank

was illegally and wrongfully obtained and did not, either in whole or in part, constitute or became a legal charge or obligation against the said School District or its funds in the hands of its said treasurer, and was at all times and is void as against said School District.

10. That by causing the said County Auditor to issue to it the said warrant and by receiving the same and by presenting it to the treasurer of said county and of said School District and receiving payment thereof the said Twin Falls National Bank wrongfully obtained and took from the funds of said School District the said sum of $160 and has not returned the same to said District or restored the same to the account of said School District with its treasurer.

COUNT II.

For a further cause of action herein and as an additional statement relating to the cause set forth in Count I hereof the plaintiffs state:

11. That the plaintiffs make each and all of paragraphs 1 to 5, inclusive, of the foregoing Count I a part of this Count to the same effect as though the allegations thereof were here repeated and again set out in full, and state further:

12. That on the 20th day of September, 1929, the plaintiff, Common School District No. 32, had

on hand and to its credit in the hands of the County Treasurer of Twin Falls County, Idaho, acting as the treasurer of said School District, funds in excess of the sum of Two Hundred and Twelve Dollars, in addition to the amount stated in Count I of this complaint, which funds were subject to withdrawal only upon a warrant to and upon the treasurer of said County acting as treasurer of said School District, lawfully issued by the County Auditor of said County, upon presentation and delivery to said Auditor of the order or orders of said School District signed by the Clerk of the board of trustees of said School District and also signed by the chairman of said board or, in the absence of the chairman, by the other members of the board.

13. That on the 20th day of September, 1929, the said Twin Falls National Bank caused the county auditor of said Twin Falls County to issue and deliver to it a warrant on the county treasurer of said county calling for the payment by said treasurer from the funds of said School District of the sum of Two Hundred and Twelve Dollars, said warrant being numbered 28171; that on the 9th day of October, 1929, the said Bank presented said warrant to the county treasurer of said County and by virtue thereof received of said treasurer from the funds of said School District the said sum of Two Hundred and Twelve Dollars.

14. That neither prior to nor at the time of the issuing of said warrant, nor at the time of the payment thereof, nor at the time the said Twin Falls National Bank received the money thereon had said Bank sold or furnished to the said School District any supplies, materials or other property, or thing of value, neither had it furnished or rendered any services to or for the said School District, and said District was not at said time or at any time indebted to said Bank in the sum of Two Hundred and Twelve Dollars or any other sum; that said warrant was not issued nor was the same paid to discharge in whole or in part any debt or obligation then due or owing to said Bank from said School District.

15. That said warrant was by the said Twin Falls National Bank so obtained without presenting or delivering to said county auditor any order or orders issued by said School District or in its behalf or by its authority, or any signed by the clerk of the board of trustees of said District or by its chairman or any of its members; that said School District has not and had not at any time issued or caused to be issued or authorized the issuance of any order or orders for the warrant so obtained by the said Bank; that no order for such warrant was at any time signed by the Clerk of the board of trustees of said School District or by the chairman of said board or by any of the other members

thereof; that the warrant so obtained by the said Bank from the county auditor was illegally and wrongfully issued and by said Bank was illegally and wrongfully obtained and did not, in whole or in part, constitute or become a legal charge or obligation against said School District or its funds in the hands of its treasurer, and was at all times and now is void as against said School District.

16. That by causing the said county auditor to issue to it the warrants mentioned in this Count and in Count I of this Bill and by receiving them and presenting them to the treasurer of said county and of said School District and receiving payment thereof the said Twin Falls National Bank wrongfully and without authority of law obtained and took from the funds of said School District the said sums of $160 and $212 and has not returned the same or any part thereof to said School District or restored the same or any part thereof to the account of said School District with its treasurer.

17. That the money so taken and held by the said Twin Falls National Bank did not at any time become and is not now the property of said Bank but has been at all times and now is held by said Bank wrongfully and in trust for the said School District and is now so held by the defendant, G. D. Thompson as receiver of said Bank, and that because of the matters and things set forth in this Bill

the said School District has as against said Bank and as against the receiver thereof, the said G. D. Thompson, a just and legal claim for the amount of money so taken, with interest from the several dates the same was taken by said Bank, and that the whole thereof is now held by said Bank and by its said receiver as a trust fund which the said School District is entitled to have enforced and allowed as a preferred claim against the money and other assets of said Bank which came into the hands of the receiver thereof and paid in preference to the general creditors of said Bank.

18. That for the purpose of recovering the amount of its funds so taken, the said Common School District No. 32 brought an action on the claims above set out against the said Twin Falls National Bank, in the District Court of the Eleventh Judicial District of the State of Idaho, in and for Twin Falls County, being numbered 7859 in said court, in which action such proceedings were had as resulted in a judgment in favor of said School District and against the said Twin Falls National Bank, bearing date the 8th day of December, 1931, in the amount of $435.77, besides the costs and disbursements of suit expended by the plaintiff in said action amounting to the sum of $11.40, which judgment is wholly unpaid. A copy of said judgment is hereto attached, marked "Exhibit A," and made a part of this Bill.

19. That at all times from the time said warrants were paid to the said Twin Falls National Bank, as above set forth, up to and including the day when the said Bank became insolvent and ceased doing business, said Bank had on hand money in an amount greater than the amount of said judgment and more than sufficient to pay the claim of the said School District and held the same in trust for said School District.

20. That on the 4th day of February, 1932, the said Common School District No. 32 presented to the above named Raymond H. Haase, the then acting receiver of the said Twin Falls National Bank, for filing and attention a claim against said Bank and against him as receiver thereof, based on the judgment so entered in favor of said School District and against said Bank, demanding that the same be made and allowed as a preferred claim and ordered to be paid as such in preference to the claims of the general creditors of said Bank, but that such demand has been refused and the said Raymond H. Haase and the said G. D. Thompson, as his successor in said trust, have both refused and still refuse to classify and allow the claim of said School District as a preferred claim in accordance with such demand.

COUNT III.

For a further cause of action against the defendants the plaintiffs state:

1. That the plaintiff Common School District No. 36 is and at all of the times hereinafter stated was a regularly organized and existing Common School District in the County of Twin Falls in the State of Idaho, and as such was at all of said times and now is a body corporate, and by and in its name its Trustees bring this action for its use and benefit.

2. That the Twin Falls National Bank was at all of the times hereinafter mentioned, up to the 23rd day of November, 1931, a National Banking Association, duly organized and existing under and pursuant to the laws of the United States.

3. That on the 23rd day of November, 1931, the said Twin Falls National Bank become insolvent and on said date ceased doing business as a bank, and has not at any time since that date conducted the business for which it was organized.

4. That immediately after its failure Raymond H. Haase was duly appointed and became the lawfully acting receiver of the said Twin Falls National Bank for the purposes of its liquidation, and continued to act in that capacity until after the 4th day of February, 1932; and as such receiver took into his possession all of the money and other assets of said bank on hand at the time it ceased doing business.

5. That subsequent to the 4th day of February, 1932, the defendant G. D. Thompson became and

now is the lawfully acting receiver of the said Twin Falls National Bank in the place and stead of the said Raymond H. Haase.

6. That on the 11th day of September, 1929, the plaintiff Common School District No. 36 had on hand and to its credit in the hands of the County Treasurer of Twin Falls County, Idaho, acting as the treasurer of said School District, funds in excess of the sum of One Hundred and Sixty Dollars, which funds were subject to withdrawal only upon a warrant to and upon the treasurer of said county, acting as the treasurer of said School District, lawfully issued by the county auditor of said county upon the presentation and delivery to said auditor of the order or orders of said School District signed by the clerk of the board of trustees of the School District and also signed by the chairman of the board, or, in his absence, by the other members of the board.

7. That on the 11th day of September, 1929, the said Twin Falls National Bank caused the county auditor of said Twin Falls County to issue and deliver to it a warrant on the county treasurer of said county calling for the payment by said treasurer from the funds of said School District of the sum of One Hundred and Sixty Dollars, said warrant being numbered 28144; that on the 20th day of September, 1929, the said Bank presented said war-

rant to the county treasurer of said county and by virtue thereof received from said treasurer of the funds of said School District the said sum of $160.

8. That neither prior to nor at the time of the issuing of said warrant, nor at the time of the payment thereof, nor at the time said Twin Falls National Bank received the money thereon, had said Bank sold or furnished to the said School District any supplies, materials or other property or thing of value, neither had it furnished or rendered any services to or for the said School District, and said School District was not at said times or at any time indebted to said Bank in the sum of $160 or any other amount; that said warrant was not issued nor was the same paid to discharge in whole or in any part any debt or obligation then due or owing to said Bank from said School District.

9. That said warrant was by the said Twin Falls National Bank so obtained without presenting or delivering to said county auditor any order or orders issued by said School District or in its behalf or by its authority, or any signed by the clerk of the board of trustees of said District or by its chairman or any of its members; that said School District has not and had not at any time issued or caused to be issued or authorized the issuance of any order or orders for the warrant so obtained by the said Bank; that no order for such warrant was at any time signed by the clerk of the board of trustees of said School Dis-

trict or by the chairman of said board or by any of the other members thereof; that the warrant so obtained by the said Bank from the county auditor of said county was illegally and wrongfully issued and by said Bank was illegally and wrongfully obtained and did not, either in whole or in part, constitute or become a legal charge or obligation against said School District or its funds in the hands of its treasurer, and was at all times and now is void as against said School District.

10. That by causing the said county auditor to issue to it the said warrant and by receiving the same and presenting it to the treasurer of said county and of said School District and receiving payment thereof the said Twin Falls National Bank wrongfully obtained and took from the funds of said School District the said sum of $160 and has not returned the same to said District or restored it or any part thereof to the account of the District with its treasurer.

11. That the money so taken and held by the said Twin Falls National Bank did not at any time become and is not now the property of said Bank but has been at all times and is now held by said Bank wrongfully and in trust for said School District and is now so held by the defendant G. D. Thompson as receiver of said Bank, and that because of the matters set forth in this Bill the said School District has as against said Bank and as against the receiver

thereof, the defendant G. D. Thompson, a just and legal claim for the amount of money so taken, with interest from the time of the taking at the rate of seven per cent per annum; that the whole thereof is now held by said Bank and its said receiver as a trust fund for the use and benefit of said School District and that said School District has as against said fund a just and legal claim which it is entitled to have made preferred and paid in preference to the claims of the general creditors of said Bank.

12. That at all times from the time said warrant was paid, as above set forth, up to and including the day when the said Bank became insolvent and ceased doing business and when the receiver thereof took possession of its money and other assets, said Bank had on hand money in an amount greater than the amount of the claim of said School District and held sufficient thereof as a trust fund in favor of said School District to pay its claim in full.

13. That for the purpose of recovering the amount of its funds so taken, the said School District brought an action on its claim above set out against the said Twin Falls National Bank in the District Court of the Eleventh Judicial District of the State of Idaho in and for Twin Falls County, being numbered 7874 in said court, in which action such proceedings were had as resulted in a judgment in favor of said School District and against the said Twin Falls National Bank, bearing date the

8th day of December, 1931, in the amount of $183.49 besides the costs and disbursements of suit paid by the plaintiff in said action, amounting to $11.40, which judgment is wholly unpaid. A copy of said judgment is hereto attached, marked Exhibit B, and made a part of this Bill.

14. That on the 4th day of February, 1932, the said Common School District No. 36 presented to the above named Raymond H. Haase, the then acting receiver of the said Twin Falls National Bank, for filing and attention, a claim against said Bank and against him as receiver thereof, based on the judgment so entered in favor of said School District and against said Bank, demanding that the same be made and allowed as a preferred claim and ordered to be paid as such in preference to the claims of the general creditors of said Bank, but that such demand has been refused and the said Raymond H. Haase and the said G. D. Thompson, as the successor in said trust, have both refused and still refuse to classify and allow said claim as a preferred claim in accordance with such demand.

COUNT IV.

For a further cause of action against the defendant the plaintiffs state:

1. That the plaintiff Common School District No. 47 is and at all of the times hereinafter stated,

was a regularly organized and existing Common School District in the County of Twin Falls, State of Idaho, and as such was at all of said times and now is a body corporate, and by and in its name its trustees bring this action for its use and benefit.

2. That the Twin Falls National Bank was at all of the times hereinafter mentioned, up to the 23rd day of November, 1931, a National Banking Association, duly organized and existing under and pursuant to the laws of the United States.

3. That on the 23rd day of November, 1931, the said Twin Falls National Bank became insolvent and on said date ceased doing business as a bank, and has not at any time since then conducted the business for which it was organized.

4. That immediately after its failure Raymond H. Haase was duly appointed and became the lawfully acting receiver of said Twin Falls National Bank for the purposes of its liquidation, and continued to act in that capacity until after the 4th day of February, 1932; and as such receiver took into his possession all of the money and other assets of said bank on hand at the time it ceased doing business.

5. That subsequent to the 4th day of February, 1932, the defendant G. D. Thompson became and now is the lawfully acting receiver of the said Twin

Falls National Bank in the place and stead of the said Raymond H. Haase.

6. That on the 28th day of May, 1929, the plaintiff Common School District No. 47 had on hand and to its credit in the hands of the county treasurer of Twin Falls County, Idaho, acting as the treasurer of said School District, funds in excess of the sum of Two Hundred and Twenty-five Dollars, which funds were subject to withdrawal only upon a warrant to and upon said treasurer, lawfully issued by the county auditor of said county upon the presentation and delivery to said auditor of the order or orders of said School District signed by the clerk of the board of trustees of the District and also signed by the chairman of the board, or, in his absence, by the other members.

7. That on the 28th day of May, 1929, the said Twin Falls National Bank caused the county auditor of said Twin Falls County, to issue and deliver to it a warrant on the county treasurer of said county calling for the payment by said treasurer from the funds of said School District, of the sum of $225, said warrant being numbered 28062; that on the first day of June, 1929, said Bank presented said warrant to said treasurer and by virtue thereof received from said treasurer of the funds of said School District the said sum of $225.

8. That neither prior to nor at the time of the issuing of said warrant, nor at the time of the pay-

ment thereof, nor at the time the said Twin Falls National Bank received the money thereon, had said Bank sold or furnished to said School District any supplies, materials or other property or thing of value, neither had it furnished or rendered any services to or for said District, and said District was not at said times or at any time indebted to said Bank in the sum of $225 or any other amount; that said warrant was not issued nor was the same paid to discharge any debt or obligation then due or owing to said Bank from the School District.

9. That said warrant was by the said Twin Falls National Bank so obtained without presenting or delivering to said county auditor any order or orders issued by said School District or in its behalf or by its authority, or any signed by the clerk of the board of trustees of the District or by its chairman or any of its members; that said School District has not and had not at any time issued or caused to be issued or authorized the issuance of any order or orders for the warrant so obtained by said Bank; that no order for such warrant was at any time signed by the clerk of the board of trustees of said District or by the chairman of said board or by any of its other members; that the warrant so obtained by said Bank from the county auditor of said county was illegally and wrongfully issued and by said bank was wrongfully and illegally obtained and did not, either in whole or in part constitute or be-

come a legal charge or obligation against said School District or its funds in the hands of its treasurer, and was at all times and now is void as against said School District.

10. That by causing the said county auditor to issue to it the said warrant and by receiving the same and presenting it to the treasurer of said county and of said School District and receiving payment thereof the said Twin Falls National Bank wrongfully obtained and took from the funds of said School District the said sum of $225 and has not returned the same to said District or restored it or any part thereof to the account of the District with its treasurer.

11. That the money so taken and held by the said Twin Falls National Bank did not at any time become the property of said Bank but has been at all times and is now by said Bank held wrongfully and in trust for said School District and is now so held by the defendant G. D. Thompson as receiver of said Bank, and that because of the matters set forth in this Bill the said School District has as against said Bank and against the receiver thereof, the defendant G. D. Thompson, a just, legal and equitable claim for the amount of money so taken, with interest from the time of taking at seven per cent per annum; that the whole thereof is now held by the Bank and its said receiver as a trust fund for the use and benefit of said School District

and that said District has as against said fund a just, legal and equitable claim which it is entitled to have made preferred and paid in preference to the claims of the general creditors of said Bank.

12. That at all times from the time said warrant was paid, as above set forth, up to and including the day when said Bank became insolvent and ceased doing business and when the receiver thereof took possession of its money and other assets, said Bank had on hand money in an amount greater than the amount of the claim of said School District and held sufficient thereof as a trust fund in favor of said District to pay its claim in full.

13. That for the purpose of recovering the amount of its funds so taken, the said School District brought an action on its claim as above set forth against the said Twin Falls National Bank in the District Court of the Eleventh Judicial District of Idaho, in and for Twin Falls County, being numbered 7913 in said court, in which action such proceedings were had as resulted in a judgment in favor of said School District and against the said Twin Falls National Bank, bearing date the 8th day of December, 1931, in the amount of $263.93, besides the costs and disbursements of suit paid by the plaintiff in the action amounting to $11.40, which judgment is wholly unpaid. A copy of said judgment is hereto attached marked Exhibit C and made a part of this Bill.

14. That on the 4th day of February, 1932, the said Common School District No. 47 presented to the above named Raymond H. Haase, the then acting receiver of the said Twin Falls National Bank, for filing and attention, a claim against said Bank and against him as the receiver thereof, based on the judgment so entered in said action, demanding that the same be made and allowed as a preferred claim and ordered to be paid as such in preference to the claims of the general creditors of said Bank, but that such demand has been refused and the said Raymond H. Haase as such receiver, and the defendant G. D. Thompson as the successor in said trust, have both refused and still refuse to classify and allow said claim as a preferred claim in accordance with such demand.

COUNT V.

For a further cause of action against the defendant the plaintiffs state:

1. That the plaintiff Common School District No. 59 is and at all of the times hereinafter stated was a regularly organized and existing Common School District in the County of Twin Falls, State of Idaho, and as such was at all of said times and now is a body corporate and by and in its name its Trustees bring this action for its use and benefit.

2. That the Twin Falls National Bank was at all of the times hereinafter mentioned, up to the 23rd

day of November, 1931, a National Banking Association, duly organized and existing under and pursuant to the laws of the United States.

3. That on the 23rd day of November, 1931, the said Twin Falls National Bank became insolvent and on said date ceased doing business as a bank and has not at any time since that date conducted the business for which it was organized.

4. That immediately after its failure Raymond H. Haase was duly appointed and became the lawfully acting receiver of the said Twin Falls National Bank for the purposes of its liquidation, and continued to act in that capacity until after the fourth day of February, 1932; and as such receiver took into his possession all of the money and other assets of said Bank on hand at the time it ceased doing business.

5. That subsequent to the 4th day of February, 1932, the defendant G. D. Thompson became and now is the lawfully acting receiver of said Bank in the place and stead of the said Raymond H. Haase.

6. That on the 7th day of May, 1929, the plaintiff, Common School District No. 59, had on hand and to its credit in the hands of the county treasurer of Twin Falls County, Idaho, acting as the treasurer of said School District, funds in excess of the sum of Two Hundred and Twenty-five Dol-

lars, which funds were subject to withdrawal only upon a warrant to and upon the treasurer of said county, acting as treasurer of said District, lawfully issued by the county auditor of said county upon presentation and delivery to said auditor of the order or orders of said District signed by the clerk of the board of trustees of the School District and also signed by the chairman of said board, or, in his absence, by the other members of the board.

7. That on the 7th day of May, 1929, the said Twin Falls National Bank caused the county auditor of said Twin Falls County to issue and deliver to it a warrant on the county treasurer of said county calling for the payment by said treasurer from the funds of the said School District of the sum of $225, said warrant being numbered 28040; that on the 15th day of May, 1929, said Bank presented said warrant to the county treasurer of said county and by virtue thereof received from said treasurer of the funds of the said School District the said sum of $225.

8. That neither prior to nor at the time of the issuing of said warrant, nor at the time of the payment thereof nor at the time said Bank received the money thereon, had said Bank sold or furnished to the said School District any supplies, materials or other property or thing of value, neither had it furnished or rendered any services to or for said District, and said District was not at

said times or at any time indebted to said Bank in the sum of $225 or any other amount; that said warrant was not issued nor was the same paid to discharge any debt or obligation then due or owing to said Bank from the said School District.

9. That said warrant was by the said Twin Falls National Bank so obtained without presenting or delivering to said county auditor any order or orders issued by said School District or in its behalf or by its authority, or any signed by the clerk of the board of trustees of the District or by its chairman or any of its members; that said School District has not and had not at any time issued or caused to be issued or authorized the issuance of any order or orders for the warrant so obtained by said Bank; that no order for such warrant was at any time signed by the clerk of the board of trustees of the District or by the chairman of said board or by any of its other members; that the warrant so obtained by said Bank from the county auditor of said county was illegally and wrongfully issued and by said Bank wrongfully and illegally obtained and did not in any part constitute or become a legal charge against or obligation of said School District or against its funds in the hands of its treasurer, and was at all times and now is void as against said School District.

10. That by causing the said county auditor to issue to it the said warrant and by receiving the

same and presenting it to the treasurer of said county and of said School District and receiving payment thereof the said Twin Falls National Bank wrongfully obtained and took from the funds of said District the said sum of $225 and has not returned the same to said District or restored any part thereof to the account of the District with its treasurer.

11. That the money so taken and held by the said Twin Falls National Bank did not at any time become the property of said Bank but has been at all times and now is by said bank held wrongfully and in trust for said School District and is now so held by the defendant G. D. Thompson as receiver of said Bank, and that because of the matters set forth in this Bill the said School District has as against said Bank and against the receiver thereof a just, legal and equitable claim for the amount of money so taken, with interest from the time of taking at seven per cent per annum; that the whole thereof is now held by the Bank and by its receiver as a trust fund for the use and benefit of said School District and that said District has as against said fund a just, legal and equitable claim which it is entitled to have made preferred and paid in preference to the claims of the general creditors of said Bank.

12. That at all times from the time said warrant was paid, as above set forth, up to and including the

day when said Bank became insolvent and ceased doing business and when the receiver took possession of its money and other assets, said Bank had on hand money in an amount greater than the amount of the claim of said School District and held sufficient thereof as a trust fund in favor of said District to pay its claim in full.

13. That for the purpose of recovering the amount of its funds so taken the said School District brought an action on its claim as above set forth against the said Twin Falls National Bank in the District Court of the Eleventh Judicial District of the State of Idaho, in and for Twin Falls County, being numbered 7928 in said court, in which action such proceedings were had as resulted in a judgment in favor of said School District and against the said Bank, bearing date the 8th day of December, 1931, in the amount of $265.69, besides the costs and disbursements of suit expended by the plaintiff in the action, amounting to the sum of $11.40, which judgment is wholly unpaid. A copy of said judgment is hereto attached, marked Exhibit D and made a part of this Bill.

14. That on the 4th day of February, 1932, the said Common School District No. 59 presented to the said Raymond H. Haase the then acting receiver of the said Twin Falls National Bank, for filing and attention, a claim against said Bank and against said receiver, based on the judgment so entered in

said action, demanding that the same be made and allowed as a preferred claim and ordered to be paid as such in preference to the claims of the general creditors of said Bank, but that such demand was refused and the said Raymond H. Haase as such receiver, and the defendant G. D. Thompson as the successor in said trust, have both refused and still refuse to classify and allow said claim as a preferred claim in accordance with such demand.

COUNT VI.

For a further cause of action against the defendant the plaintiffs state:

1. That the plaintiff, Common School District No. 62 is and at all of the times hereinafter stated was a regularly organized and existing Common School District in the County of Twin Falls, State of Idaho, and as such was at all of said times and now is a body corporate, and by and in its name its Trustees bring this action for its use and benefit.

2. That the Twin Falls National Bank was at all of the times hereinafter mentioned, up to the 23rd day of November, 1931, a National Banking Association, duly organized and existing under and pursuant to the laws of the United States.

3. That on the 23rd day of November, 1931, the said Twin Falls National Bank became insolvent

and on said date ceased doing business as a bank and has not at any time since that date conducted the business for which it was organized.

4. That immediately after its failure Raymond H. Haase was duly appointed and became the lawfully acting receiver of said Bank for the purposes of its liquidation and continued to act in that capacity until after the 4th day of February, 1932; and as such receiver took into his possession all of the money and other assets of said Bank on hand at the time it ceased doing business.

5. That subsequent to the 4th day of February, 1932, the defendant G. D. Thompson became and now is the lawfully acting receiver of the said Twin Falls National Bank in the place and stead of the said Raymond H. Haase.

6. That on the 8th day of January, 1929, the plaintiff, Common School District No. 62, had on hand and to its credit in the hands of the county treasurer of Twin Falls County, Idaho, acting as the treasurer of said School District, funds in excess of the sum of One Hundred Dollars, which funds were subject to withdrawal only upon a warrant to and upon the treasurer of said county acting as the treasurer of said School District, lawfully issued by the county auditor of said county upon the presentation and delivery to said county auditor of the order or orders of said School Dis-

trict signed by the clerk of the board of trustees of said District and also signed by the chairman of said board, or, in his absence, by the other members of the board.

7. That on the 8th day of January, 1929, the said Twin Falls National Bank caused the county auditor of said Twin Falls County to issue and deliver to it a warrant on the county treasurer of said county, calling for the payment by said treasurer from the funds of said School District of the sum of One Hundred Dollars, said warrant being numbered 27937; that on the 19th day of January, 1929, said Bank presented said warrant to said treasurer and by virtue and the use thereof received from said treasurer from the funds of said School District the sum of One Hundred Dollars.

8. That neither prior to nor at the time of the issuing of said warrant, nor at the time of the payment thereof, nor at the time the said Bank received the money thereon had the said Bank sold or furnished to the said School District any supplies, materials or other property or thing of value, neither had it furnished or rendered any services to or for said School District, and said District was not at said times or at any time indebted to said Bank in the sum of $100 or any other amount; that said warrant was not issued nor was the same paid to discharge any debt or obligation then due or owing from said District to said Bank.

9. That said warrant was by the said Twin Falls National Bank so obtained without presenting or delivering to said county auditor any order or orders issued by said School District No. 62 or in its behalf or by its authority, or any signed by the clerk of the board of trustees of said District or by its chairman or any of the members of said board; that said School District has not and had not at any time issued or caused to be issued or authorized the issuance of any order or orders for the warrant so obtained by said Bank; that no order for such warrant was at any time signed by the clerk of the board of trustees of said District or by the chairman of said board or by any of the other members; that the warrant so obtained by said Bank from the county auditor was illegally and wrongfully issued and by said Bank was illegally and wrongfully obtained and did not in any part constitute or become a legal charge against or obligation of said School District or its funds in the hands of its said treasurer, and was at all times and now is void as against said District.

10. That by causing said county auditor to issue to it the said warrant and by receiving the same and presenting it to the treasurer of said District and receiving payment thereof the said Bank wrongfully obtained and took from the funds of said School District the said sum of $100 and has not returned the same to said District or restored any

portion thereof to the account of said District with its treasurer.

COUNT VII.

For a further cause of action herein and as an additional statement relating to the cause of action set up in Count VI hereof the plaintiffs state:

11. That the plaintiffs make each and all of the paragraphs 1 to 5, inclusive, of the foregoing Count VI a part of this Count to the same effect as though the allegations thereof were here repeated and again set out in full, and state further:

12. That on the 25th day of March, 1929, the plaintiff, Common School District No. 62, had on hand and to its credit in the hands of the county treasurer of Twin Falls County, Idaho, acting as the treasurer of said School District, funds in excess of the sum of $240, in addition to the amount stated in Count VI of this Bill, which funds were subject to withdrawal only upon a warrant to and upon said treasurer, lawfully issued by the county auditor of said county, upon presentation and delivery to him of the order or orders of said School District signed by the clerk of the board of trustees of the District and signed also by the chairman of said board, or, in his absence, by the other members thereof.

13. That on the 25th day of March, 1929, the said Twin Falls National Bank caused the county

auditor of said Twin Falls County to issue and deliver to it a warrant on the county treasurer of said county calling for the payment by said treasurer from the funds of said School District of the sum of $240, said warrant being numbered 28006; that on the 28th day of March, 1929, said Bank presented to said treasurer said warrant and by virtue and the use thereof received of said treasurer from the funds of said School District the said sum of $240.

14. That neither prior to nor at the time of the issuing of said warrant nor at the time of the payment thereof nor at the time said Bank received the money thereon had said Bank sold or furnished to said School District any supplies, materials or other property or thing of value, neither had it furnished or rendered any services to or for said District, and said School District was not at said times or at any time indebted to said Bank in the sum of $240 or any other amount; that said warrant was not issued nor was the same paid to discharge any debt or obligation then due or owing said Bank from the said District.

15. That said warrant was by the said Twin Falls National Bank so obtained without presenting or delivering to said county auditor any order or orders issued by said School District or in its behalf or by its authority or any signed by the clerk of the board of trustees of the District or by its chairman or by any of its members; that said District

has not and had not at any time issued or caused to be issued or authorized the issuance of any order or orders for the warrant so obtained by said Bank; that no order for such warrant was at any time signed by the clerk of the board of trustees of said District or by the chairman of said board or any of the other members thereof; that the warrant so obtained by the Bank from the county auditor was illegally and wrongfully issued and by said Bank was illegally and wrongfully obtained and did not constitute or become a legal charge against or obligation of said School District or any of its funds, and that the same is now and at all times was void as against said School District.

16. That by causing the said county auditor to issue to it the warrants mentioned in this Count and in Count VI of this Bill and by receiving them and presenting them to said treasurer and receiving payment thereof the said Twin Falls National Bank wrongfully and without authority of law obtained and took from the funds of said School District the said sums of $100 and $240 and has not returned any part thereof to said District or restored any portion to the account of the District with its treasurer.

17. That the money so taken and held by the said Twin Falls National Bank did not at any time become and is not now the property of said Bank but has been at all times and now is held by said

Bank wrongfully and in trust for said School District and is now so held by the defendant G. D. Thompson as receiver of said Bank, and that by reason of the matters set forth in this Bill, and particularly in this Count and in Count VI, said School District has as against said Bank and against the defendant as receiver thereof, a just, legal and equitable claim and demand for the amounts of money so taken, with interest, and that the whole thereof is now held by said Bank and its said receiver as a trust fund for said School District from which said District is entitled to have its claims paid in full in preference to the claims of the general creditors of said Bank.

18. That for the purpose of recovering the amount of its funds so taken, said Common School District No. 62 brought an action on the claims set forth in this Count and in Count VI hereof against the said Twin Falls National Bank in the District Court of the Eleventh Judicial District of the State of Idaho, in and for Twin Falls County, being numbered 7876 in said court, in which action such proceedings were had as resulted in a judgment in favor of said School District and against said Bank, bearing date the 8th day of December, 1931, in the amount of $404.49, besides the costs and disbursements of suit paid by the plaintiff in the action, amounting to $11.40, which judgment is wholly un-

paid. A copy of said judgment is hereto attached, marked Exhibit E, and made a part of this Bill.

19. That at all times from the times said warrants were paid, as above set forth, up to and including the day when said Bank became insolvent and ceased doing business and when the receiver took possession of its money and other assets, said Bank had on hand money in an amount greater than the amount of the claims of said School District and held sufficient thereof as a trust fund in favor of the School District to pay its claims in full, which fund was taken possession of by said receiver.

20. That on the 4th day of February, 1932, said Common School District No. 62 presented to the said Raymond H. Haase, the then acting receiver of the said Twin Falls National Bank, for filing and attention, a claim against said Bank and against the said receiver, based on and evidenced by said judgment so entered in said action, demanding that the same be made and allowed as a preferred claim and ordered to be paid as such in preference to the claims of the general creditors of the Bank, but that such demand was refused and the said Raymond H. Haase as such receiver and the said G. D. Thompson as the successor in said trust, have both refused and still refuse to classify and allow said claim as preferred in accordance with such demand.

Wherefore the plaintiffs pray that judgment and decree be entered herein finding, determining and

decreeing that the several claims of the respective plaintiffs as set forth in this bill and as evidenced by the allegations and exhibits presented by them be established and declared to be preferred claims against the money and assets of the Twin Falls National Bank that came into the possession of Raymond H. Haase as receiver of said Bank, and ordering and directing the defendant G. D. Thompson as receiver of said Bank to make payments of said several claims prior and in preference to the claims of the general creditors of said Bank.

Plaintiffs further pray that they be given such other, further and different relief as they may be entitled to in the premises.

SWEELEY & SWEELEY,
Attorneys for Plaintiffs, residing at Twin Falls, Idaho.

State of Idaho, }
} ss.
County of Twin Falls, }

M. J. Sweeley, being sworn, states on oath as follows:

That he is one of the attorneys for the plaintiffs in the above entitled action and was one of the attorneys for the several plaintiffs in the actions brought by them respectively, in which actions judgments were entered in their favor as set forth in the foregoing bill;

That he is personally familiar with the public records on which the claims of the plaintiffs are founded and has better knowledge of them than has any of the officers of the plaintiffs; that he has prepared the foregoing bill and knows its contents and that the allegations therein set forth are true as he verily believes.

M. J. SWEELEY,

Subscribed and sworn to before me this 21st day of September, 1932.

.....

Notary Public.

(Service acknowledged)

EXHIBIT A.

In the District Court of the Eleventh Judicial District of the State of Idaho, in and for the County of Twin Falls.

Common School District No. 32, in the County of Twin Falls, State of Idaho,

Plaintiff,

vs.

Twin Falls National Bank, a corporation,

Defendant.

Case No. 7859

ORDER AND JUDGMENT

Be it remembered that heretofore, to-wit, on the 12th day of November, 1931, this cause came on for hearing on the motion of defendant for an order relieving it from that portion of the stipulation entered into by the parties to the action on the 12th day of February, 1931, which is in words and figures as follows:

"It is further stipulated and agreed that in the event the judgments so entered in cases No. 7806 and 7805, respectively, are both affirmed by the Supreme Court then judgment may, upon motion for counsel for the plaintiff herein, be entered in these actions in favor of the plaintiff and against the defendant as prayed in plaintiff's complaint," and on the motion of plaintiff for judgment as prayed in its complaint herein, at which time the plaintiff appeared by Sweeley & Sweeley, its attorneys, and the defendant appeared by James R. Bothwell and W. Orr Chapman, its attorneys.

The court thereupon heard arguments of counsel on said motions and at their close took said matters under advisement.

Now on this 8th day of December, 1931, the court, having considered said motions and be-

ing fully advised in the premises finds that on the 12th day of February, 1931, the parties to this action, acting by their attorneys of record, signed their written stipulation whereby it was by them agreed that in the event judgments which had been entered by this court in cases numbered 7806 and 7805, respectively, in this court, were both affirmed by the Supreme Court of the State of Idaho, to which court appeals in said cases had been taken, then judgment may, upon motion of counsel for the plaintiff herein be entered in favor of the plaintiff and against the defendant as prayed in plaintiff's complaint; that the judgments in both of said cases numbered 7806 and 7805, respectively, have been affirmed by the Supreme Court of the State of Idaho.

The court further finds that the showing made by defendant is not sufficient to justify the relieving of defendant from said stipulation and that the motion of plaintiff for judgment as prayed in its complaint should be granted.

It is therefore by the court ordered that the motion of defendant asking that it be relieved from said stipulation be and the same is by the court denied, and that the motion of plaintiff for judgment in accordance with its complaint herein be and the same is granted.

It is therefore by the court ordered and adjudged that the plaintiff have and recover of and from the defendant on plaintiff's first cause of action set out in its complaint the sum of One Hundred and Sixty Dollars, with interest thereon at the rate of seven per cent per annum from the 18th day of January, 1929, amounting at this time to the sum of One Hundred, Ninety-one and 73/100 Dollars, and on plaintiff's second cause of action set out in its complaint the sum of Two Hundred and Twelve Dollars with interest thereon from the 20th day of September, 1929, at the rate of seven per cent per annum, amounting at this time to the sum of $244.04, making, in the aggregate, on both counts, the sum of $435.77, besides plaintiff's costs and disbursements of suit, taxed at $11.40, and that execution issue therefor.

By the Court:

(signed) WM. A. BABCOCK,
Judge District Court.

EXHIBIT B.

In the District Court of the Eleventh Judicial District of the State of Idaho, in and for the County of Twin Falls.

Common School District No. 36, in the County of Twin Falls, State of Idaho,

Plaintiff,

vs.

Twin Falls National Bank, a corporation,

Defendant.

Case No. 7874

ORDER AND JUDGMENT

Be it remembered that heretofore, to-wit, on the 12th day of November, 1931, this cause came on for hearing on the motion of defendant for an order relieving it from that portion of the stipulation entered into by the parties to the action on the 12th day of February, 1931, which is in words and figures as follows:

"It is further stipulated and agreed that in the event the judgments so entered in cases No. 7806 and 7805, respectively, are both affirmed by the Supreme Court, then judgment may, upon motion for counsel for the plaintiff herein, be entered in these actions in favor of the plaintiff and against the defendant as prayed in plaintiff's complaint," and on the motion of plaintiff for judgment as prayed in its complaint herein, at which time the plaintiff appeared by Sweeley & Sweeley, its attorneys,

and the defendant appeared by James R. Bothwell and W. Orr Chapman, its attorneys; whereupon the court heard arguments of counsel on said motions and at their close took said matters under advisement.

Now on this 8th day of December, 1931, the court having considered said motions and being fully advised in the premises finds that on the 12th day of February, 1931, the parties to this action, acting by their attorneys of record, signed their written stipulation whereby it was by them agreed that in the event the judgments which had been entered by this court in cases numbered 7806 and 7805, respectively, in this court, were both affirmed by the Supreme Court of the State of Idaho, to which court appeals in said cases had been taken, then judgment may, upon motion of counsel for the plaintiff herein, be entered in favor of the plaintiff and against the defendant as prayed in plaintiff's complaint; that the judgments in both of said cases numbered 7806 and 7805, respectively, have been affirmed by the Supreme Court of the State of Idaho.

The court further finds that the showing made by defendant is not sufficient to justify the relieving of defendant from said stipulation, that the motion therefor should be denied and that the motion of plaintiff for judgment

as prayed in its complaint should be granted. It is therefore ordered that the motion of defendant asking that it be relieved from said stipulation be and the same is by the court denied, and that the motion of plaintiff for judgment in accordance with the prayer of its complaint herein be and the same is granted.

It is by the court further ordered and adjudged that the plaintiff have and recover of and from the defendant on the cause of action set out in the complaint in this action the sum of One Hundred and Sixty Dollars, with interest thereon at the rate of seven per cent per annum from the 11th day of September, 1929, amounting at this time to the sum of $183.49, besides the costs and disbursements of suit taxed at $11.40.

By the Court:

(signed) WM. A. BABCOCK,
Judge District Court.

EXHIBIT C.

In the District Court of the Eleventh Judicial District of the State of Idaho, in and for the County of Twin Falls.

Common School District No. 47, in the County of Twin Falls, State of Idaho,

Plaintiff,

vs.

Twin Falls National Bank, a corporation,

Defendant.

Case No. 7913

ORDER AND JUDGMENT

Be it remembered that heretofore, to-wit, on the 12th day of November, 1931, this cause came on for hearing on the motion of defendant for an order relieving it from that portion of the stipulation entered into by the parties to the action on the 12th day of February, 1931, which is in words and figures as follows:

"It is further stipulated and agreed that in the event the judgments so entered in cases No. 7806 and 7805, respectively, are both affirmed by the Supreme Court, then judgment may, upon motion for counsel for the plaintiff herein, be entered in these actions in favor of the plaintiff and against the defendant as prayed in plaintiff's complaint," and on the motion of plaintiff for judgment as prayed in its complaint herein, at which time the plaintiff appeared by Sweeley & Sweeley, its attorneys,

and the defendant appeared by James R. Bothwell and W. Orr Chapman, its attorneys; whereupon the court heard arguments of counsel on said motions and at their close took said matters under advisement.

Now on this 8th day of December, 1931, the court having considered said motions and being fully advised in the premises finds that on the 12th day of February, 1931, the parties to this action, acting by their attorneys of record, signed their written stipulation whereby it was by them agreed that in the event the judgments which had been entered by this court in cases numbered 7806 and 7805, respectively, in this court, were both affirmed by the Supreme Court of the State of Idaho, to which court appeals in said cases had been taken, then judgment may, upon motion of counsel for the plaintiff herein, be entered in favor of the plaintiff and against the defendant as prayed in plaintiff's complaint; that the judgments in both of said cases numbered 7806 and 7805, respectively, have been affirmed by the Supreme Court of the State of Idaho.

The court further finds that the showing made by defendant is not sufficient to justify the relieving of defendant from said stipulation, that the motion therefor should be denied and that the motion of plaintiff for judgment

as prayed in its complaint should be granted. It is therefore ordered that the motion of defendant asking that it be relieved from said stipulation be and the same is by the court denied, and that the motion of plaintiff for judgment in accordance with the prayer of its complaint herein be and the same is granted.

It is by the court further ordered and adjudged that the plaintiff have and recover of and from the defendant on the cause of action set out in the complaint in this action the sum of Two Hundred and Twenty-five Dollars, with interest thereon at the rate of seven per cent per annum from the 28th day of May, 1929, amounting at this time to the sum of $263.93, besides the costs and disbursements of suit taxed at $11.40.

By the Court:

(signed) WM. A. BABCOCK,
Judge District Court.

EXHIBIT D.

In the District Court of the Eleventh Judicial District of the State of Idaho, in and for the County of Twin Falls.

Common School District No. 59, in the County of Twin Falls, State of Idaho,

Plaintiff,

vs.

Twin Falls National Bank, a corporation,

Defendant.

Case No. 7928

ORDER AND JUDGMENT

Be it remembered that heretofore, to-wit, on the 12th day of November, 1931, this cause came on for hearing on the motion of defendant for an order relieving it from that portion of the stipulation entered into by the parties to the action on the 12th day of February, 1931, which is in words and figures as follows:

"It is further stipulated and agreed that in the event the judgments so entered in cases No. 7806 and 7805 respectively are both affirmed by the Supreme Court, then judgment may, upon motion for counsel for the plaintiff herein, be entered in these actions in favor of the plaintiff and against the defendant as prayed in plaintiff's complaint," and on the motion of plaintiff for judgment as prayed in its complaint herein, at which time the plaintiff appeared by Sweeley & Sweeley, its attorneys,

and the defendant appeared by James R. Bothwell and W. Orr Chapman, its attorneys; whereupon the court heard arguments of counsel on said actions and at their close took said matters under advisement.

Now on this 8th day of December, 1931, the court having considered said motions and being fully advised in the premises finds that on the 12th day of February, 1931, the parties to this action, acting by their attorneys of record, signed their written stipulation whereby it was by them agreed that in the event the judgments which had been entered by this court in cases numbered 7806 and 7805, respectively, in this court, were both affirmed by the Supreme Court of the State of Idaho, to which court appeals in said cases had been taken, then judgment may, upon motion of counsel for the plaintiff herein, be entered in favor of the plaintiff and against the defendant as prayed in plaintiff's complaint; that the judgments in both of said cases numbered 7806 and 7805, respectively, have been affirmed by the Supreme Court of the State of Idaho.

The court further finds that the showing made by defendant is not sufficient to justify the relieving of defendant from said stipulation, that the motion therefor should be denied and that the motion of plaintiff for judgment

as prayed in its complaint should be granted. It is therefore ordered that the motion of defendant asking that it be relieved from said stipulation be and the same is by the court denied, and that the motion of plaintiff for judgment in accordance with the prayer of its complaint herein be and the same is granted.

It is by the court further ordered and adjudged that the plaintiff have and recover of and from the defendant on the cause of action set out in the complaint in this action the sum of Two Hundred and Twenty-five Dollars, with interest thereon at the rate of seven per cent per annum from the 11th day of April, 1929, amounting at this time to the sum of $265.69, besides the costs and disbursements of suit taxed at $11.40.

By the Court:

(Signed) WM. A. BABCOCK,
Judge District Court.

EXHIBIT E.

In the District Court of the Eleventh Judicial District of the State of Idaho, in and for the County of Twin Falls.

Common School District No. 62, in the County of Twin Falls, State of Idaho,

Plaintiff,

vs.

Twin Falls National Bank, a corporation,

Defendant.

Case No. 7876

ORDER AND JUDGMENT

Be it remembered that heretofore, to-wit, on the 12th day of November, 1931, this cause came on for hearing on the motion of defendant for an order relieving it from that portion of the stipulation entered into by the parties to the action on the 12th day of February, 1931, which is in words and figures as follows:

"It is further stipulated and agreed that in the event the judgments entered in cases No. 7806 and 7805, respectively, are both affirmed by the Supreme Court, then judgment may upon motion for counsel for the plaintiff herein be entered in these actions in favor of the plaintiff and against the defendant as prayed in plaintiff's complaint," and on the motion of plaintiff for judgment as prayed in its complaint, at which time the plaintiff appeared by Sweeley & Sweeley, its attorneys, and the de-

fendant appeared by James R. Bothwell and W. Orr Chapman, its attorneys; whereupon the court heard arguments of counsel on said motions and at their close took said matters under advisement.

Now on this 8th day of December, 1931, the court having considered said motions and being fully advised in the premises finds that on the 12th day of February, 1931, the parties to this action, acting by their attorneys of record, signed their written stipulation whereby it was by them agreed that in the event the judgments which had been entered by this court in cases numbered 7806 and 7805, in this court, were both affirmed by the Supreme Court of the State of Idaho, to which court appeals in said cases had been taken, then judgment may, upon motion of counsel for plaintiff herein be entered in favor of plaintiff and against defendant as prayed in plaintiff's complaint; that the judgments in both of said cases numbered 7806 and 7805 have been affirmed by the supreme court of the State of Idaho.

The court further finds that the showing made by the defendant is not sufficient to justify the relieving of defendant from its said stipulation, that the motion therefor should be denied, and that the motion of plaintiff for judgment as prayed in its complaint should be

granted. It is therefore ordered that the motion of defendant be and the same is by the court denied and that the motion of plaintiff for judgment be and the same is granted.

It is by the court further ordered and adjudged that the plaintiff have and recover of and from the defendant on plaintiff's first cause of action set out in its complaint the sum of $100 with interest thereon at the rate of seven per cent per annum from the 8th day of January, 1929, and on plaintiff's second cause of action set out in its complaint the sum of $240 with interest thereon at the rate of seven per cent per annum from the 25th day of March, 1929, said two claims amounting at this time to the sum of $404.49, and that plaintiff recover its costs and disbursements of suit amounting to $11.40.

By the Court:

(signed) WM. A. BABCOCK,
Judge District Court.

(Title of Court and Cause)

ANSWER

Filed Oct. 31, 1932.

Comes now G. D. Thompson as Receiver of the Twin Falls National Bank, the above named de-

fendant, and in answer to Count One of plaintiff's Bill in Equity on file herein, admits, denies and alleges:

I.

Admits each and all of the allegations contained in Paragraph I of Count I of said Bill in Equity.

II.

Admits each and all of the allegations contained in Paragraph II of Count I of said Bill in Equity.

III.

Admits each and all of the allegations contained in Paragraph III of Count I of said Bill in Equity.

IV.

Admits each and all of the allegations contained in Paragraph IV of Count I of said Bill in Equity.

V.

Admits each and all of the allegations contained in Paragraph V of Count I of said Bill in Equity.

VI.

Admits each and all of the allegations contained in Paragraph VI of Count I of said Bill in Equity.

VII.

Answering the allegations contained in Paragraph VII of said Count I, defendant denies that on or about January 19, 1929, or at any other time the said Twin Falls National Bank received from

the County Treasurer out of the funds of said school district the sum of One Hundred and Sixty Dollars or any other sum or amount. Admits each and all of the remaining allegations of said paragraph.

VIII.

Admits each and all of the allegations contained in Paragraph VIII of Count I of said Bill in Equity.

IX.

Admits that said warrant was by the said Twin Falls National Bank obtained from the said County Auditor of Twin Falls County, Idaho, without presenting or delivering to the said County Auditor any order or orders issued by said School District No. 32 or in its behalf or by its authority or any order signed by the Clerk of the Board of Trustees of the said School District No. 32 or by its chairman or any of its members but in that regard defendant alleges the facts to be that said Twin Falls National Bank prior to said 18th day of January, 1929, had purchased for a valuable cash consideration, to-wit, the sum of $160.00 at its banking house in Twin Falls, Idaho, an order purporting to be the genuine and bona fide order of said School District No. 32 drawn upon and directed to the County Auditor of Twin Falls County, Idaho. That said order in all respects appeared to be regular and genuine and was duly and regularly countersigned by the County Superintendent of Public Instruction of Twin Falls Coun-

ty, Idaho. That said Twin Falls National Bank presented said order for warrant to the Auditor of Twin Falls County, Idaho, in good faith on or about the 18th day of January, 1929, and the County Auditor of said County issued to said Bank the warrant referred to in said Count I. Admits all the remaining allegations of Paragraph IX of said Count I.

X.

Denies each and all of the allegations contained in Paragraph X of Count I of said Bill in Equity.

Further answering the allegations contained in Count I of plaintiff's Bill in Equity on file herein and by way of a further, separate and affirmative defense thereto, defendant alleges:

That no part of the proceeds of the warrant described in Count I of plaintiff's Bill in Equity on file herein and no part of the proceeds of any check or draft given in payment of said warrant ever came into the possession or custody of said Twin Falls National Bank or into the hands of either Raymond H. Haase, Receiver, or G. D. Thompson, Receiver. And the funds of said Twin Falls National Bank have not been augmented by the proceeds of said warrant or by the proceeds of any check or draft given in payment of said warrant, and no part of said proceeds is now in the

custody, care or possession of the defendant G. D. Thompson, Receiver.

Further answering the allegations contained in Count I of plaintiffs' Bill in Equity on file herein and by way of a further, separate and affirmative defense thereto, defendant alleges:

That for the purpose of recovering a judgment against said Twin Falls National Bank based upon the warrant, claim, matters and things set forth in Count I of plaintiffs' Bill in Equity said Common School District numbered 32 commenced, and prosecuted to final judgment an action in the District Court of the Eleventh Judicial District of the State of Idaho, in and for the County of Twin Falls. That a final judgment was made and given in said action December 8th, 1931, in favor of said Common School District numbered 32, the plaintiff therein and against Twin Falls National Bank, defendant therein. That a copy of said Judgment, marked "Exhibit A" is attached to and made a part of plaintiffs' Bill in Equity on file herein.

That said judgment so obtained in said action was a general money judgment and was not a judgment for the return of specific property. That such claim as plaintiff School District No. 32 held against said Bank and which said claim is set forth in Count I in said Bill in Equity was by the prosecution and final determination of said action merged

in the judgment given and made by the said District Court of Twin Falls County, Idaho, and plaintiff School District No. 32 at all times since judgment was made and given, has held and now holds only a general claim against the Receiver of said Bank. That such claim as the plaintiff School District No. 32 now holds against said Bank is based upon said money judgment, and plaintiff School District No. 32 is not entitled to a preference over the depositors and other creditors of said bank and is not entitled to have any of the funds now in the custody of the Receiver of said bank impressed with a trust for the benefit of plaintiff School District No. 32.

Further answering the allegations contained in Count I of plaintiffs' Bill in Equity on file herein and by way of a further, separate and affirmative defense thereto, defendant alleges:

That it appears upon the face of plaintiff's complaint that the cause of action and the claims, matters and things set out in Count I of said complaint are barred by the provisions of Subdivision 3 of Section 6611 of the Compiled Statutes of the State of Idaho.

Answering the allegations contained in Count II of plaintiffs' Bill in Equity on file herein defendant admits, denies and alleges:

XI.

Admits each and all of the allegations contained in Paragraph XI of said Count II.

XII.

Admits each and all of the allegations contained in Paragraph XII of said Count II.

XIII.

Answering the allegations contained in Paragraph XIII of said Count II defendant denies that on or about the 9th day of October, 1929, the said Twin Falls National Bank received from the County Treasurer out of the funds of said School District the sum of $112.00 or any other sum or amount. Admits each and all of the remaining allegations of said Paragraph.

XIV.

Admits each and all of the allegations contained in Paragraph XIV of said Count II.

XV.

Admits that said warrant was by said Twin Falls National Bank obtained from the said County Auditor of Twin Falls County, Idaho, without presenting or delivering to the said County Auditor any Order or Orders issued by said School District Numbered 32 or in its behalf or by its authority or any order signed by the Clerk of the Board of Trustees of said School District numbered 32 or by

its Chairman, or any of its members but in that regard defendant alleges the facts to be that said Twin Falls National Bank prior to said 20th day of September, 1929, had purchased for a valuable consideration, to-wit, the sum of $112.00 at its banking house in Twin Falls, Idaho, an order purporting to be the genuine and bona fide order of said School District numbered 32 drawn upon and directed to the County Auditor of Twin Falls County, Idaho. That said Order in all respects appeared to be regular and genuine and was duly and regularly countersigned by the County Superintendent of Public Instruction. That said Twin Falls National Bank presented said Order for warrant to the Auditor of Twin Falls County, Idaho, in good faith on or about the 20th day of September, 1929, and the County Auditor of said County issued to said Bank the warrant referred to in said Count II. Admits all the remaining allegations of Paragraph XV of said Count II.

XVI.

Denies each and all of the allegations contained in Paragraph XVI of said Count II. And denies that said Twin Falls National Bank wrongfully and without authority of law, or otherwise, obtained and took from the funds of said School District the said sums of $160.00 and $112.00, or any other sum or amount.

XVII.

Denies each and all of the allegations contained in Paragraph XVII of said Count II.

XVIII.

Admits each and all of the allegations contained in Paragraph XVIII of said Count II.

XIX.

Admits each and all of the allegations contained in Paragraph XIX of said Count II.

XX.

Admits each and all of the allegations contained in Paragraph XX of said Count II.

Further answering the allegations contained in Count II of plaintiffs' Bill in Equity on file herein and by way of a first, further, separate and affirmative defense thereto defendant alleges:

That no part of the proceeds of the $112.00 warrant described in Count II and no part of the proceeds of any check or draft given in payment of said warrant ever came into the possession or custody of said Twin Falls National Bank or into the hands of either Raymond H. Haase, Receiver, or G. D. Thompson, Receiver, and the funds of said Twin Falls National Bank have not been augmented by the proceeds of said warrant or by the proceeds of any check or draft given in payment of said warrant and no part of the proceeds is now in said

Bank or among its funds and no part of said proceeds is now in the custody, care or possession of the defendant G. D. Thompson, Receiver.

Further answering the allegations contained in Count II of plaintiffs' Bill in Equity on file herein and by way of a second, further, separate and affirmative defense thereto defendant alleges:

That for the purpose of recovering a judgment against said Twin Falls National Bank based upon the $112.00 warrant and the claim, matters and other things set forth in said Count II said Common School District Numbered 32 commenced and prosecuted to final judgment an action in the District Court of the Eleventh Judicial District of the State of Idaho in and for the County of Twin Falls. That a final judgment was made and given in said action December 8, 1931, in favor of said Common School District Numbered 32, the plaintiff therein and against Twin Falls National Bank, defendant therein. That a copy of said Judgment, marked "Exhibit A" is attached to and made a part of plaintiffs' Bill in Equity on file herein.

That said judgment so obtained in said action was a general money judgment and was not a judgment for the return of specific property. That such claim as plaintiff School District No. 32 held against said Bank and which said claim is set forth in Count II in said Bill in Equity was by the prosecu-

tion and final determination of said action merged in the judgment given and made by the said District Court of Twin Falls County, Idaho, and plaintiff School District No. 32 at all times since judgment was made and given, has held and now holds only a general claim against the Receiver of said Bank. That such claim as the plaintiff School District No. 32 now holds against said bank is based upon said money judgment, and plaintiff School District No. 32 is not entitled to a preference over the depositors and other creditors of said bank and is not entitled to have any of the funds now in the custody of the Receiver of said Bank impressed with a trust for the benefit of plaintiff School District No. 32.

Further answering the allegations contained in Count II of plaintiffs' Bill in Equity on file herein and by way of a third, further, separate and affirmative defense thereto defendant alleges:

That it appears upon the face of plaintiffs' Bill in Equity that the cause of action and the claims, matters and things set out in Count II of said Bill in Equity are barred by the provisions of Subdivision 3 of Section 6611 of the Compiled Statutes of the State of Idaho.

Answering the allegations contained in Count III of plaintiffs' Bill in Equity on file herein defendant admits, denies and alleges:

I.

Admits each and all of the allegations contained in Paragraph I of said Count III.

II.

Admits each and all of the allegations contained in Paragraph II of said Count III.

III.

Admits each and all of the allegations contained in Paragraph III of said Count III.

IV.

Admits each and all of the allegations contained in Paragraph IV of said Count III.

V.

Admits each and all of the allegations contained in Paragraph V of said Count III.

VI.

Admits each and all of the allegations contained in Paragraph VI of said Count III.

VII.

Answering the allegations contained in Paragraph VII of said Count III defendant denies that on or about the 20th day of September, 1929, or at any other time the said Twin Falls National Bank received from the County Treasurer out of the funds of said School District the sum of $160.00, or any other sum or amount. Admits each and all of the remaining allegations of said Paragraph.

VIII.

Admits each and all of the allegations contained in Paragraph VIII of said Count III.

IX.

Admits that said warrant was by the said Twin Falls National Bank obtained from the said County Auditor of Twin Falls County, Idaho, without presenting or delivering to the said County Auditor any order or orders issued by said School District numbered 36 or in its behalf or by its authority or any order signed by the Clerk of the Board of Trustees of said School District numbered 36 or by its chairman or any of its members but in that regard defendant alleges the facts to be that said Twin Falls National Bank prior to said 11th day of September, 1929, had purchased for a valuable cash consideration, to-wit, the sum of $160.00 at its banking house in Twin Falls, Idaho, an order purporting to be the genuine and bona fide order of said School District numbered 36 drawn upon and directed to the County Auditor of Twin Falls County, Idaho. That said order in all respects appeared to be regular and genuine and was duly and regularly countersigned by the County Superintendent of Public Instruction of Twin Falls County, Idaho. That said Twin Falls National Bank presented said order for warrant to the Auditor of Twin Falls County in good faith on or about the 11th day of September, 1929, and the County Audi-

tor of said County issued to said Bank the warrant referred to in said Count III. Admits each and all of the remaining allegations of said Paragraph.

X.

Denies each and all of the allegations contained in Paragraph X of said Count III.

XI.

Denies each and all of the allegations contained in Paragraph XI of said Count III.

XII.

Admits each and all of the allegations contained in Paragraph XII of said Count III.

XIII.

Admits each and all of the allegations contained in Paragraph XIII of said Count III.

XIV.

Admits each and all of the allegations contained in Paragraph XIV of said Count III.

Further answering the allegations contained in Count III of plaintiff's Bill in Equity on file herein and by way of a first, further, separate and affirmative defense thereto defendant alleges:

That no part of the proceeds of the warrant described in Count III of plaintiffs' Bill in Equity on file herein and no part of the proceeds of any check or draft given in payment of said warrant

ever came into the possession or custody of said Twin Falls National Bank or into the hands of either Raymond H. Haase, Receiver, or G. D. Thompson, Receiver. And the funds of said Twin Falls National Bank have not been augmented by the proceeds of said warrant or by the proceeds of any check or draft given in payment of said warrant, and no part of the proceeds is now in said bank or among its funds and no part of said proceeds is now in the custody, care or possession of the defendant G. D. Thompson, Receiver.

Further answering the allegations contained in Count III of plaintiffs' Bill in Equity on file herein and by way of a second, further, separate and affirmative defense thereto defendant alleges:

That for the purpose of recovering a judgment against said Twin Falls National Bank based upon the warrant, claim, matters and things set forth in said Count III said Common School District numbered 36 commenced and prosecuted to final judgment an action in the District Court of the Eleventh Judicial District of the State of Idaho, in and for Twin Falls County. That final judgment was made and given in said action on the 9th day of December, 1931, in favor of said Common School District numbered 36, the plaintiff therein, and against Twin Falls National Bank, defendant therein. That a copy of said Judgment, marked "Exhibit B" is at-

tached to and by reference made a part of plaintiffs' Bill in Equity on file herein.

That said judgment so obtained in said action was a general money judgment and was not a judgment for the return of specific property. That such claim as plaintiff School District No. 36 held against said Bank and which said claim is set forth in Count III in said Bill in Equity was by the prosecution and final determination of said action merged in the judgment given and made by the said District Court of Twin Falls County, Idaho, and plaintiff School District numbered 36 at all times since judgment was made and given has held and now holds only a general claim against the Receiver of said Bank. That such claim as the plaintiff School District No. 36 now holds against said bank is based upon said money judgment, and plaintiff School District No. 36 is not entitled to a preference over the depositors and other creditors of said bank and is not entitled to have any of the funds now in the custody of the Receiver of said Bank impressed with a trust for the benefit of plaintiff School District No. 36.

Further answering the allegations contained in Count III of plaintiffs' Bill in Equity on file herein and by way of a third, further, separate and affirmative defense thereto, defendant alleges:

That it appears upon the face of plaintiffs' Bill in Equity that the cause of action and the claims,

matters and things set out in Count III of said Bill in Equity are barred by the provisions of Subdivision 3 of Section 6611 of the Compiled Statutes of the State of Idaho.

Answering the allegations contained in Count IV of plaintiffs' Bill in Equity on file herein defendant admits, denies and alleges:

I.

Admits each and all of the allegations contained in Paragraph I of said Count IV.

II.

Admits each and all of the allegations contained in Paragraph II of said Count IV.

III.

Admits each and all of the allegations contained in Paragraph III of said Count IV.

IV.

Admits each and all of the allegations contained in Paragraph IV of said Count IV.

V.

Admits each and all of the allegations contained in Paragraph V of said Count IV.

VI.

Admits each and all of the allegations contained in Paragraph VI of said Count IV.

VII.

Answering the allegations contained in Paragraph VII of said Count IV defendant denies that

on or about the 1st day of June, 1929, or at any other time the said Twin Falls National Bank received from the County Treasurer out of the funds of said School District the sum of $225.00, or any other sum or amount. Admits each and all of the remaining allegations of said Paragraph.

VIII.

Admits each and all of the allegations contained in Paragraph VIII of said Count IV.

IX.

Admits that said warrant was by the said Twin Falls National Bank obtained from the said County Auditor of Twin Falls County, Idaho, without presenting or delivering to the said County Auditor any order or orders issued by said School District numbered 47 or in its behalf or by its authority or any order signed by the Clerk of the Board of Trustees of said School District numbered 47 or by its chairman or any of its members but in that regard defendant alleges the facts to be that said Twin Falls National Bank prior to said 28th day of May, 1929, had purchased for a valuable cash consideration, to-wit, the sum of $225.00 at its banking house in Twin Falls, Idaho, an order purporting to be the genuine and bona fide order of said School District numbered 47 drawn upon and directed to the County Auditor of Twin Falls County, Idaho. That said order in all respects appeared to be regular and genuine and was duly and regularly countersigned

by the County Superintendent of Public Instruction of Twin Falls County, Idaho. That said Twin Falls National Bank presented said order for warrant to the Auditor of Twin Falls County in good faith on or about the 28th day of May, 1929, and the County Auditor of said County issued to said Bank the warrant referred to in said Count IV. Admits each and all of the remaining allegations of said Paragraph.

X.

Denies each and all of the allegations contained in Paragraph X of said Count IV.

XI.

Denies each and all of the allegations contained in Paragraph XI of said Count IV.

XII.

Admits each and all of the allegations contained in Paragraph XII of said Count IV.

XIII.

Admits each and all of the allegations contained in Paragraph XIII of said Count IV.

XIV.

Admits each and all of the allegations contained in Paragraph XIV of said Count IV.

Further answering the allegations contained in Count IV of plaintiffs' Bill in Equity on file herein and by way of a first, further, separate and affirmative defense thereto defendant alleges:

That no part of the proceeds of the warrant described in Count IV of plaintiffs' Bill in Equity on file herein and no part of the proceeds of any check or draft given in payment of said warrant ever came into the possession or custody of said Twin Falls National Bank or into the hands of either Raymond H. Haase, Receiver, or G. D. Thompson, Receiver. And the funds of said Twin Falls National Bank have not been augmented by the proceeds of said warrant or by the proceeds of any check or draft given in payment of said warrant, and no part of the proceeds is now in said bank or among its funds and no part of said proceeds is now in the custody, care or possession of the defendant G. D. Thompson, Receiver.

Further answering the allegations contained in Count IV of plaintiffs' Bill in Equity on file herein and by way of a second, further, separate and affirmative defense thereto defendant alleges:

That for the purpose of recovering a judgment against said Twin Falls National Bank based upon the warrant, claim, matters and things set forth in said Count IV said Common School District numbered 47 commenced and prosecuted to final judgment an action in the District Court of the Eleventh Judicial District of the State of Idaho, in and for Twin Falls County. That final judgment was made and given in said action on the 8th day of December, 1931, in favor of said Common School District Num-

bered 47, the plaintiff therein, and against Twin Falls National Bank, defendant therein. That a copy of said Judgment, marked "Exhibit C" is attached to and by reference made a part of plaintiff's Bill in Equity on file herein.

That said judgment so obtained in said action was a general money judgment and was not a judgment for the return of specific property. That such claim as plaintiff School District No. 47 held against said Bank and which said claim is set forth in Count IV in said Bill in Equity was by the prosecution and final determination of said action merged in the judgment given and made by the said District Court of Twin Falls County, Idaho, and plaintiff School District numbered 47 at all times since judgment was made and given, has held and now holds only a general claim against the Receiver of said Bank. That such claim as the plaintiff School District No. 47 now holds against said bank is based upon said money judgment, and plaintiff School District No. 47 is not entitled to a preference over the depositors and other creditors of said bank and is not entitled to have any of the funds now in the custody of the Receiver of said Bank impressed with a trust for the benefit of plaintiff School District No. 47.

Further answering the allegations contained in Count IV of plaintiffs' Bill in Equity on file herein

and by way of a third, further, separate and affirmative defense thereto, defendant alleges:

That it appears upon the face of plaintiffs' Bill in Equity that the cause of action and the claims, matters and things set out in Count IV of said Bill in Equity are barred by the provisions of Subdivision 3 of Section 6611 of the Compiled Statutes of the State of Idaho.

Answering the allegations contained in Count V of Plaintiffs' Bill in Equity on file herein defendant admits, denies and alleges:

I.

Admits each and all of the allegations contained in Paragraph I of said Count V.

II.

Admits each and all of the allegations contained in Paragraph II of said Count V.

III.

Admits each and all of the allegations contained in Paragraph III of said Count V.

IV.

Admits each and all of the allegations contained in Paragraph IV of said Count V.

V.

Admits each and all of the allegations contained in Paragraph V of said Count V.

VI.

Admits each and all of the allegations contained in Paragraph VI of said Count V.

VII.

Answering the allegations contained in Paragraph VII of said Count V defendant denies that on or about the 15th day of May, 1929, or at any other time the said Twin Falls National Bank received from the County Treasurer out of the funds of said School District the sum of $225.00, or any other sum or amount. Admits each and all of the remaining allegations of said Paragraph.

VIII.

Admits each and all of the allegations contained in Paragraph VIII of said Count V.

IX.

Admits that said warrant was by the said Twin Falls National Bank obtained from the said County Auditor of Twin Falls County, Idaho, without presenting or delivering to the said County Auditor any order or orders issued by said School District numbered 59 or in its behalf or by its authority or any order signed by the Clerk of the Board of Trustees of said School District numbered 59 or by its chairman or any of its members but in that regard defendant alleges the facts to be that said Twin Falls National Bank prior to said 7th day of May, 1929, had purchased for a valuable cash considera-

tion, to-wit, the sum of $225.00 at its banking house in Twin Falls, Idaho, an order purporting to be the genuine and bona fide order of said School District numbered 59 drawn upon and directed to the County Auditor of Twin Falls County, Idaho. That said order in all respects appeared to be regular and genuine and was duly and regularly countersigned by the County Superintendent of Public Instruction of Twin Falls County, Idaho. That said Twin Falls National Bank presented said order for warrant to the Auditor of Twin Falls County in good faith on or about the 7th day of May, 1929, and the County Auditor of said County issued to said Bank the warrant referred to in said Count V. Admits each and all of the remaining allegations of said Paragraph.

X.

Denies each and all of the allegations contained in Paragraph X of said Count V.

XI.

Denies each and all of the allegations contained in Paragraph XI of said Count V.

XII.

Admits each and all of the allegations contained in Paragraph XII of said Count V.

XIII.

Admits each and all of the allegations contained in Paragraph XIII of said Count V.

XIV.

Admits each and all of the allegations contained in Paragraph XIV of said Count V.

Further answering the allegations contained in Count V of plaintiffs' Bill in Equity on file herein and by way of a first, further, separate and affirmative defense thereto defendant alleges:

That no part of the proceeds of the warrant described in Count V of plaintiffs' Bill in Equity on file herein and no part of the proceeds of any check or draft given in payment of said warrant ever came into the possession or custody of said Twin Falls National Bank or into the hands of either Raymond H. Haase, Receiver, or G. D. Thompson, Receiver. And the funds of said Twin Falls National Bank have not been augmented by the proceeds of said warrant or by the proceeds of any check or draft given in payment of said warrant, and no part of the proceeds is now in said bank or among its funds and no part of said proceeds is now in the custody, care or possession of the defendant G. D. Thompson, Receiver.

Further answering the allegations contained in Count V of plaintiffs' Bill in Equity on file herein and by way of a second, further, separate and affirmative defense thereto defendant alleges:

That for the purpose of recovering a judgment against said Twin Falls National Bank based upon

the warrant, claim, matters and things set forth in said Count V of said Common School District numbered 59 commenced and prosecuted to final judgment an action in the District Court of the Eleventh Judicial District of the State of Idaho, in and for Twin Falls County. That final judgment was made and given in said action on the 8th day of December, 1931, in favor of said Common School District numbered 59, the plaintiff therein, and against Twin Falls National Bank, defendant therein. That a copy of said Judgment, marked "Exhibit D" is attached to and by reference made a part of plaintiffs' Bill in Equity on file herein.

That said judgment so obtained in said action was a general money judgment and was not a judgment for the return of specific property. That such claim as plaintiff School District No. 59 held against said Bank and which said claim is set forth in Count V in said Bill in Equity was by the prosecution and final determination of said action merged in the judgment given and made by the said District Court of Twin Falls County, Idaho, and plaintiff School District numbered 59 at all times since judgment was made and given, has held and now holds only a general claim against the Receiver of said Bank. That such claim as the plaintiff School District No. 59 now holds against said Bank is based upon said money judgment, and plaintiff School District No. 59 is not entitled to a preference over the depositors

and other creditors of said Bank and is not entitled to have any of the funds now in the custody of the Receiver of said Bank impressed with a trust for the benefit of plaintiff School District No. 59.

Further answering the allegations contained in Count V of plaintiffs' Bill in Equity on file herein and by way of a third, further, separate and affirmative defense thereto, defendant alleges:

That it appears upon the face of plaintiffs' Bill in Equity that the cause of action and the claims, matters and things set out in Count V of said Bill in Equity are barred by the provisions of Subdivision 3 of Section 6611 of the Compiled Statutes of the State of Idaho.

Answering the allegations contained in Count VI of plaintiffs' Bill in Equity on file herein defendant admits, denies and alleges:

I.

Admits each and all of the allegations contained in Paragraph I of Count VI of said Bill in Equity.

II.

Admits each and all of the allegations contained in Paragraph II of Count VI of said Bill in Equity.

III.

Admits each and all of the allegations contained in Paragraph III of Count VI of said Bill in Equity.

IV.

Admits each and all of the allegations contained in Paragraph IV of Count VI of said Bill in Equity.

V.

Admits each and all of the allegations contained in Paragraph V of Count VI of said Bill in Equity.

VI.

Admits each and all of the allegations contained in Paragraph VI of Count VI of said Bill in Equity.

VII.

Answering the allegations contained in Paragraph VII of said Count VI, defendant denies that on or about the 19th day of January, 1929, or at any other time the said Twin Falls National Bank received from the County Treasurer out of the funds of said school district the sum of $100.00 or any other sum or amount. Admits each and all of the remaining allegations of said Paragraph.

VIII.

Admits each and all of the allegations contained in Paragraph VIII of Count VI of said Bill in Equity.

IX.

Admits that said warrant was by the said Twin Falls National Bank obtained from the said County Auditor of Twin Falls County, Idaho, without presenting or delivering to the said County Auditor

any order or orders issued by said School District No. 62 or in its behalf or by its authority or any order signed by the Clerk of the Board of Trustees of the said School District No. 62 or by its Chairman or any of its members but in that regard defendant alleges the facts to be that said Twin Falls National Bank prior to said 8th day of January, 1929, had purchased for a valuable cash consideration, to-wit, the sum of $100.00 at its banking house in Twin Falls, Idaho, an order purporting to be the genuine and bona fide order of said School District No. 62 drawn upon and directed to the County Auditor of Twin Falls County, Idaho. That said order in all respects appeared to be regular and genuine and was duly and regularly countersigned by the County Superintendent of Public Instruction of Twin Falls County, Idaho. That said Twin Falls National Bank presented said order for warrant to the Auditor of Twin Falls County, Idaho, in good faith, on or about the 8th day of January, 1929, and the County Auditor of said County issued to said Bank the warrant referred to in said Count VI. Admits all the remaining allegations of Paragraph IX of said Count VI.

X.

Denies each and all of the allegations contained in Paragraph X of Count VI of said Bill in Equity.

Further answering the allegations contained in Count VI of plaintiffs' Bill in Equity on file herein

and by way of a further, separate and affirmative defense thereto, defendant alleges:

That no part of the proceeds of the warrant described in Count VI of plaintiffs' Bill in Equity on file herein and no part of the proceeds of any check or draft given in payment of said warrant ever came into the possession or custody of said Twin Falls National Bank or into the hands of either Raymond H. Haase, Receiver, or G. D. Thompson, Receiver. And the funds of said Twin Falls National Bank have not been augmented by the proceeds of said warrant or by the proceeds of any check or draft given in payment of said warrant, and no part of the proceeds is now in said bank or among its funds and no part of said proceeds is now in the custody, care or possession of the defendant G. D. Thompson, Receiver.

Further answering the allegations contained in Count VI of plaintiffs' Bill in Equity on file herein and by way of a further, separate and affirmative defense thereto, defendant alleges:

That for the purpose of recovering a judgment against said Twin Falls National Bank based upon the warrant, claim, matters and things set forth in Count VI of plaintiffs' Bill in Equity said Common School District numbered 62 commenced and prosecuted to final judgment an action in the District Court of the Eleventh Judicial District of the State

of Idaho, in and for the County of Twin Falls. That a final judgment was made and given in said action December 8th, 1931, in favor of said Common School District numbered 62, the plaintiff therein and against Twin Falls National Bank, defendant therein. That a copy of said Judgment, marked "Exhibit E" is attached to and made a part of plaintiffs' Bill in Equity on file herein.

That said judgment so obtained in said action was a general money judgment and was not a judgment for the return of specific property. That such claim as plaintiff School District No. 62 held against said Bank and which said claim is set forth in Count VI in said Bill in Equity was by the prosecution and final determination of said action merged in the judgment given and made by the said District Court of Twin Falls County, Idaho, and plaintiff School District No. 62 at all times since judgment was made and given, has held and now holds only a general claim against the Receiver of said Bank. That such claim as the plaintiff School District No. 62 now holds against said Bank is based upon said money judgment, and plaintiff School District No. 62 is not entitled to a preference over the depositors and other creditors of said bank and is not entitled to have any of the funds now in the custody of the Receiver of said Bank impressed with a trust for the benefit of plaintiff School District No. 62.

Further answering the allegations contained in Count VI of plaintiffs' Bill in Equity on file herein and by way of a further, separate and affirmative defense thereto, defendant alleges:

That it appears upon the face of plaintiffs' complaint that the cause of action and claims, matters and things set out in Count VI of said Bill in Equity are barred by the provisions of Subdivision 3 of Section 6611 of the Compiled Statutes of the State of Idaho.

Answering the allegations contained in Count VII of plaintiffs' Bill in Equity on file herein defendant admits, denies and alleges:

XI.

Admits each and all of the allegations contained in Paragraph XI of said Count VII.

XII.

Admits each and all of the allegations contained in Paragraph XII of said Count VII.

XIII.

Answering the allegations contained in Paragraph XIII of said Count VII defendant denies that on or about the 28th day of March, 1929, the said Treasurer out of the funds of said School District the sum of $240.00 or any other sum or amount. Admits each and all of the remaining allegations of said Paragraph.

XIV.

Admits each and all of the allegations contained in Paragraph XIV of said Count VII.

XV.

Admits that said warrant was by said Twin Falls National Bank obtained from the said County Auditor of Twin Falls County, Idaho, without presenting or delivering to the said County Auditor any order or orders issued by said School District numbered 62 or in its behalf or by its authority or any order signed by the Clerk of the Board of Trustees of said School District numbered 62 or by its chairman, or any of its members but in that regard defendant alleges the facts to be that said Twin Falls National Bank prior to said 25th day of March, 1929, had purchased for a valuable consideration, to-wit, the sum of $240.00 at its banking house in Twin Falls, Idaho, an order purporting to be the genuine and bona fide order of said School District numbered 62 drawn upon and directed to the County Auditor of Twin Falls County, Idaho. That said order in all respects appeared to be regular and genuine and was duly and regularly countersigned by the County Superintendent of Public Instruction. That said Twin Falls National Bank presented said order for warrant to the Auditor of Twin Falls County, Idaho, in good faith on or about the 25th day of March, 1929, and the County Auditor of said County issued to said Bank the warrant

referred to in said Count VII. Admits all the remaining allegations of Paragraph XV of said Count VII.

XVI.

Denies each and all of the allegations contained in Paragraph XVI of said Count VII. And denies that said Twin Falls National Bank wrongfully and without authority of law, or otherwise, obtained and took from the funds of said School District the said sums of $100.00 and $240.00, or any other sum or amount.

XVII.

Denies each and all of the allegations contained in Paragraph XVII of said Count VII.

XVIII.

Admits each and all of the allegations contained in Paragraph XVIII of said Count VII.

XIX.

Admits each and all of the allegations contained in Paragraph XIX of said Count VII.

XX.

Admits each and all of the allegations contained in Paragraph XX of said Count VII.

Further answering the allegations contained in Count VII of plaintiffs' Bill in Equity on file herein and by way of a first, further, separate and affirmative defense thereto defendant alleges:

That no part of the proceeds of the $240.00 warrant described in Count VII and no part of the proceeds of any check or draft given in payment of said warrant ever came into the possession or custody of said Twin Falls National Bank or into the hands of either Raymond H. Haase, Receiver, or G. D. Thompson, Receiver, and the funds of said Twin Falls National Bank have not been augmented by the proceeds of said warrant or by the proceeds of any check or draft given in payment of said warrant and no part of the proceeds is now in said Bank or among its funds and no part of said proceeds is now in the custody, care or possession of the defendant G. D. Thompson, Receiver.

Further answering the allegations contained in Count VII of plaintiffs' Bill in Equity on file herein and by way of a second, further, separate and affirmative defense thereto defendant alleges:

That for the purpose of recovering a judgment against the said Twin Falls National Bank based upon the $240.00 warrant and the claim, matters and other things set forth in said Count VII said Common School District numbered 62 commenced and prosecuted to final judgment an action in the District Court of the Eleventh Judicial District of the State of Idaho in and for the County of Twin Falls. That a final judgment was made and given in said action December 8, 1931 in favor of said Common School District numbered 62, the plaintiff

therein, and against Twin Falls National Bank, defendant therein. That a copy of said Judgment, marked "Exhibit E" is attached to and made a part of plaintiffs' Bill in Equity on file herein.

That said Judgment so obtained in said action was a general money judgment and was not a judgment for the return of specific property. That such claim as plaintiff School District No. 62 held against said Bank and which said claim is set forth in Count VII in said Bill in Equity was by the prosecution and final determination of said action merged in the judgment given and made by the said District Court of Twin Falls County, Idaho, and plaintiff School District No. 62 at all times since judgment was made and given, has held and now holds only a general claim against the Receiver of said Bank. That such claim as the plaintiff School District No. 62 now holds against said bank is based upon said money judgment, and plaintiff School District No. 62 is not entitled to a preference over the depositors and other creditors of said bank and is not entitled to have any of the funds now in the custody of the Receiver of said Bank impressed with a trust for the benefit of plaintiff School District No. 62.

Further answering the allegations contained in Count VII of plaintiffs' Bill in Equity on file herein and by way of a third, further, separate and affirmative defense thereto defendant alleges:

That it appears upon the face of plaintiffs' Bill in Equity that the cause of action and the claims, matters and things set out in Count VII of said Bill in Equity are barred by the provisions of Subdivision 3 of Section 6611 of the Compiled Statutes of the State of Idaho.

WHEREFORE, This answering defendant prays for judgment as follows:

That plaintiffs take nothing under and by virtue of their Bill in Equity on file herein, that the same be dismissed, and that this answering defendant be allowed his costs and disbursements in this action expended, and such other and further relief as to the Court may seem meet and just in the premises.

FRANK L. STEPHAN,
Attorney for Defendant,
Residence and Office,
Twin Falls, Idaho.

(Duly verified)
(Service acknowledged)

(Title of Court and Cause)

STIPULATION
Filed Oct. 31, 1932

It is hereby stipulated and agreed by and between the parties hereto as follows:

That if the officers of the Twin Falls National Bank and the defendant G. D. Thompson, Receiver of said Bank, were called and sworn as witnesses upon the trial of this action, they would testify that at all times from and including the 15th day of January, 1929, up to and including the 23rd day of November, 1931, the said Twin Falls National Bank had cash on hand in an amount sufficient to pay in full the claims of the plaintiffs in suit herein and to pay also, in full the claim of the plaintiff in suit in case numbered 1729 in the above named court, and that on the date last stated, being the date when said Bank became insolvent and ceased doing business, it had cash on hand in the amount of $7247.74.

That this stipulation may be introduced and used in evidence by either party hereto upon the trial of the above entitled action as proof of the matters above set forth.

Dated at Twin Falls, Idaho, this 17th day of October, 1932.

SWEELEY & SWEELEY,
Attorneys for Plaintiff,

FRANK L. STEPHAN,
Attorney for Defendant.

(Title of Court and Cause)

STIPULATION OF FACTS

Filed Oct. 31, 1932.

For the purpose of expediting and shortening the trial of the above entitled Cause IT IS HEREBY STIPULATED AND AGREED by and between Sweeley and Sweeley, attorneys for plaintiffs herein and Frank L. Stephan, attorney for defendant herein, as follows:

COUNT I.

I.

That regarding the allegations contained in Paragraph VII of Count I of plaintiffs' Bill in Equity and the allegations contained in Paragraph VII of defendant's Answer to Count I, the facts are:

That on or about the 18th day of January, 1929, the Twin Falls National Bank caused the County Auditor to issue to it a warrant drawn upon the Treasurer of Twin Falls County, which officer is also the Treasurer of the several Common School Districts in the County, for the payment of a $160.-00 order for warrant, said warrant being numbered 27939. That thereafter and on or about the 19th day of January, 1929, said Twin Falls National Bank presented said warrant to the County Treas-

urer of said County and by virtue thereof received from said Treasurer a check drawn by said Treasurer upon the First National Bank of Twin Falls, Idaho. That said check was in the amount of $575.25 and was for the repayment and redemption of said $160.00 warrant and other warrants.

That on or about the 19th day of January, 1929, the Twin Falls National Bank cleared said $575.25 check, together with other checks and items with said First National Bank and said First National Bank in settlement of the difference or balance of the clearings drew a draft upon the National Copper Bank of Salt Lake City, Utah, for the sum of $774.04, payable to the Twin Falls National Bank and delivered said draft to said Twin Falls National Bank. That said Twin Falls National Bank forwarded said check to the Federal Reserve Bank at Salt Lake City and said Federal Reserve Bank collected said draft from said National Copper Bank and thereupon gave Twin Falls National Bank credit for said sum and thereafter said Federal Reserve Bank paid out all of the said sum of $774.04 in satisfaction of drafts drawn by Twin Falls National Bank upon its account with said Federal Reserve Bank in payment of debts and obligations of said Twin Falls National Bank.

II.

That all of the allegations contained in Paragraph IX of Count I of plaintiffs' Bill in Equity are

true. That all of the allegations contained in Paragraph IX of defendant's Answer to Count I are true.

III.

That regarding the allegations contained in Paragraph X of Count I of plaintiff's Bill in Equity and Paragraph X of defendant's Answer to Count I the facts are:

That Twin Falls National Bank presented to the County Auditor the order which it had previously purchased and caused the County Auditor to issue and deliver a warrant to said Bank. Said Bank then presented said warrant to the County Treasurer for payment and the County Treasurer gave said bank a check drawn upon the First National Bank of Twin Falls, Idaho, as hereinabove set out in payment of said warrant and other warrants. That said Bank did not receive $160.00 or any other sum in money from the Treasurer in payment of said warrant.

COUNT II.

I.

That regarding the allegations contained in Paragraph XIII of Count II of plaintiff's Bill in Equity, and the allegations contained in Paragraph XIII of defendant's Answer to Count II the facts are:

That on or about the 20th day of September, 1929, the Twin Falls National Bank caused the County Auditor to issue to it a warrant drawn upon the Treasurer of Twin Falls County, which officer is also the Treasurer of the several Common School Districts in the County, for the payment of a $212.00 order for warrant and another order for warrant in the amount of $290.00, said warrant being numbered 28171 in the amount of $502.00. That thereafter and on or about the 8th or 9th day of October, 1929, said Twin Falls National Bank presented said warrant to the County Treasurer of said County and by virtue thereof received from said Treasurer a check drawn by said Treasurer upon the Twin Falls Bank and Trust Company of Twin Falls, Idaho, for the sum of $502.00 made payable to said Twin Falls National Bank.

That on the 9th day of October, 1929, the Twin Falls National Bank cleared said $502.00 check, together with other checks and items with the Twin Falls Bank and Trust Company and said Twin Falls Bank and Trust Company in settlement of the difference or balance of the clearings drew a draft on the Walker Bank and Trust Company of Salt Lake City, Utah, for the sum of $2203.10, payable to the Twin Falls National Bank and delivered said draft to said Twin Falls National Bank. That said Twin Falls National Bank forwarded said draft to the Federal Reserve Bank at Salt Lake City and said

Federal Reserve Bank collected said draft from said Walker Bank and Trust Company and thereupon gave said Twin Falls National Bank credit for said sum, and thereafter said Federal Reserve Bank paid out all of said sum of $2203.10 in satisfaction of drafts drawn by said Twin Falls National Bank upon its account with said Federal Reserve Bank in payment of debts and obligations of said Twin Falls National Bank.

II.

That all of the allegations contained in Paragraph XV of Count II of plaintiffs' Bill in Equity are true. That all of the allegations contained in Paragraph XV of defendant's Answer to Count II are true.

III.

Regarding the allegations contained in Paragraph XVI of Count II of plaintiffs' Bill in Equity and the allegations contained in Paragraph XVI of defendant's Answer to Count II the facts are:

That Twin Falls National Bank presented to the County Auditor the order which it had previously purchased and caused the County Auditor to issue and deliver a warrant to said Bank. That said Bank then presented said warrant to the County Treasurer for payment and the County Treasurer gave said bank a check drawn upon the Twin Falls Bank and Trust Company, as hereinabove set out, in pay-

ment of said warrant. That said Bank did not receive $212.00, or any other sum in money from the Treasurer in payment of said warrant.

COUNT III.

I.

That regarding the allegations contained in Paragraph VII of Count III of plaintiffs' Bill in Equity and the allegations contained in Paragraph VII of defendant's Answer thereto, the facts are:

That on or about the 11th day of September, 1929, the Twin Falls National Bank caused the County Auditor to issue to it a warrant drawn upon the Treasurer of Twin Falls County, which officer is also the Treasurer of the several Common School Districts in the County, for the payment of a $160.00 Order for Warrant, and another order or orders for warrants amounting to $107.78, said warrant being numbered 28144 in the amount of $267.78. That thereafter said Twin Falls National Bank presented said warrant to the County Treasurer of said County for payment and by virtue thereof received from said Treasurer a check drawn by said Treasurer upon the Twin Falls Bank and Trust Company of Twin Falls, Idaho, for the sum of $267.78, made payable to said Twin Falls National Bank.

That on or about the 21st day of September, 1929, the Twin Falls National Bank cleared said

$267.78 check, together with other checks and items with the Twin Falls Bank and Trust Company and said Twin Falls National Bank, in settlement of the difference or balance of the clearings, drew a draft on the Continental National Bank and Trust Company of Salt Lake City, Utah, for the sum of $1311.98, payable to the Twin Falls Bank and Trust Company, and delivered said draft to said Twin Falls Bank and Trust Company, which said draft was thereafter and in due course collected by said Twin Falls Bank and Trust Company.

II.

That all of the allegations contained in Paragraph IX of Count III of plaintiff's Bill in Equity are true. That all of the allegations contained in Paragraph IX of defendant's Answer thereto are true.

III.

That regarding the allegations contained in Paragraph X of Count III of plaintiffs' Bill in Equity and Paragraph X of defendant's Answer thereto the facts are:

That Twin Falls National Bank presented to the County Auditor the order which it had previously purchased and caused the County Auditor to issue and deliver a warrant to said bank. That said bank then presented said warrant to the County Treasurer for payment and the County

Treasurer gave said bank a check drawn upon the Twin Falls Bank and Trust Company of Twin Falls, Idaho, as hereinabove set out, in payment of said warrant. That said Bank did not receive $160.00, or any other sum in money from the Treasurer in payment of said warrant.

COUNT IV.

I.

That regarding the allegations contained in Paragraph VII of Count IV of plaintiffs' Bill in Equity, and the allegations contained in Paragraph VII of defendant's Answer thereto the facts are:

That on or about the 28th day of May, 1929, the Twin Falls National Bank caused the County Auditor to issue to it a warrant drawn upon the Treasurer of Twin Falls County, which officer is also the Treasurer of the several Common School Districts in the County, for the payment of a $225.00 order for warrant and another order or orders for warrants, said warrant being numbered 28062. That thereafter, and on or about the 1st day of June, 1929, said Twin Falls National Bank presented said warrant to the County Treasurer of said County for payment and by virtue thereof received from said Treasurer a check drawn by said Treasurer upon the Twin Falls Bank and Trust Company of Twin Falls, Idaho. That said check was in the amount of $500.00 and was for the payment and redemption of said above described warrant.

That on or about the 6th day of June, 1929, Twin Falls National Bank cleared said $500.00 check, together with other checks and items, with said Twin Falls Bank and Trust Company and said Twin Falls National Bank in settlement of the difference or balance of the clearings drew a draft upon Continental National Bank of Salt Lake City, Utah, for $3917.52 payable to the Twin Falls Bank and Trust Company and delivered said draft to said Twin Falls Bank and Trust Company and said Twin Falls Bank and Trust Company thereafter in due course collected the same.

II.

That all of the allegations contained in Paragraph IX of Count IV of plaintiffs' Bill in Equity are true. That all of the allegations contained in Paragraph IX of defendant's answer thereto are true.

III.

That regarding the allegations contained in Paragraph X of Count IV of plaintiffs' Bill in Equity and Paragraph X of defendant's Answer thereto, the facts are:

That Twin Falls National Bank presented to the County Auditor the Order which it had previously purchased and caused the County Auditor to issue and deliver a warrant to said bank. Said Bank then presented said warrant to the County Treasurer for

payment and the County Treasurer gave said bank a check drawn upon the Twin Falls Bank and Trust Company of Twin Falls, Idaho, as hereinabove set out, in payment of said warrant. That said Twin Falls National Bank did not receive the sum of $225.00 or any other sum in money from the Treasurer in payment of said Warrant.

COUNT V.

I.

Regarding the allegations contained in Paragraph VII of Count V of plaintiffs' Bill in Equity and the allegations contained in Paragraph VII of defendant's Answer thereto, the facts are:

That on or about the 7th day of May, 1929, the Twin Falls National Bank caused the County Auditor to issue to it a warrant drawn upon the Treasurer of Twin Falls County, which officer is also the Treasurer of the several Common School Districts in the County, for the payment of a $225.00 Order for Warrant, said warrant being numbered 28040. That thereafter and on or about the 15th day of May, 1929, said Twin Falls National Bank presented said warrant to the County Treasurer of said County and by virtue thereof received from said Treasurer a check drawn by said Treasurer upon the First National Bank of Twin Falls, Idaho. That said check was in the amount of $225.00 and was for the payment and redemption of said $225.00 warrant.

That on or about the 16th day of May, 1929, the Twin Falls National Bank cleared said $225.00 check, together with other checks and items with said First National Bank and said Twin Falls National Bank in settlement of the difference or balance of the clearings drew a draft upon the Continental National Bank of Salt Lake City, Utah, for the sum of $559.25 payable to said First National Bank and delivered said draft to said First National Bank and said First National Bank thereafter in due course collected the same.

II.

That all of the allegations contained in Paragraph IX of Count V of plaintiffs' Bill in Equity are true. That all of the allegations contained in Paragraph IX of defendant's Answer thereto are true.

III.

That regarding the allegations contained in Paragraph X of Count V of plaintiffs' Bill in Equity and Paragraph X of defendant's Answer thereto the facts are:

That Twin Falls National Bank presented to the County Auditor the order which it had previously purchased and caused the County Auditor to issue and deliver a warrant to said bank. Said Bank then presented said warrant to the County Treasurer for payment and the County Treasurer gave said Bank a check drawn upon the First National

Bank of Twin Falls, Idaho, as hereinabove set out, in payment of said warrant. That said Twin Falls National Bank did not receive $225.00 or any other sum in money from the Treasurer in payment of said warrant.

COUNT VI.

I.

Regarding the allegations contained in Paragraph VII of Count VI of plaintiffs' Bill in Equity and the allegations contained in Paragraph VII of defendant's Answer thereto, the facts are:

That on or about the 8th day of January, 1929, the Twin Falls National Bank caused the County Auditor to issue to it a warrant drawn upon the Treasurer of Twin Falls County, which officer is also the Treasurer of the several Common School Districts in the County, for the payment of a $100.00 order for warrant and another order or orders for warrants, said warrant being numbered 27967. That thereafter and on or about the 15th day of January, 1929, said Twin Falls National Bank presented said warrant to the County Treasurer of said County and by virtue thereof received from said Treasurer a check drawn by said Treasurer upon Twin Falls Bank and Trust Company of Twin Falls, Idaho. That said check was in the amount of $151.69 and was for the payment and redemption of said above described warrant.

That on or about the 15th day of January, 1929, the Twin Falls National Bank cleared said $151.69 check together with other checks and items with said Twin Falls Bank and Trust Company and said Twin Falls National Bank in settlement of the difference or balance of the clearings drew a draft upon the Continental National Bank of Salt Lake City, Utah, for the sum of $4024.00 payable to said Twin Falls Bank and Trust Company and delivered said draft to said Twin Falls Bank and Trust Company and said Twin Falls Bank and Trust Company thereafter in due course collected said draft.

II.

That all of the allegations contained in Paragraph IX of Count VI of plaintiffs' Bill in Equity are true. That all of the allegations contained in Paragraph IX of defendant's Answer thereto are true.

III.

Regarding the allegations contained in Paragraph X of Count VI of plaintiffs' Bill in Equity and the allegations contained in Paragraph X of defendant's Answer thereto the facts are:

The Twin Falls National Bank presented to the County Auditor the order which it had previously purchased and caused the County Auditor to issue and deliver a warrant to said Bank. That said Bank then presented the said warrant to the

County Treasurer for payment and the County Treasurer gave said Bank a check drawn upon the Twin Falls Bank and Trust Company of Twin Falls, Idaho, as hereinabove set out, in payment of said warrant. That said Twin Falls National Bank did not receive $100.00 or any other sum in money from the Treasurer in payment of said warrant.

COUNT VII.

I.

That regarding the allegations contained in Paragraph XIII of Count VII of plaintiffs' Bill in Equity and the allegations contained in Paragraph XIII of defendant's Answer thereto, the facts are:

That on or about the 25th day of March, 1929, the Twin Falls National Bank caused the County Auditor to issue to it a warrant drawn upon the Treasurer of Twin Falls County, which officer is also the Treasurer of the several Common School Districts in the County, for the payment of a $240.-00 order for warrant and another order or orders for warrants, said warrant being numbered 28006. That thereafter and on or about the 28th day of March, 1929, said Twin Falls National Bank presented said warrant to the County Treasurer of said County and by virtue thereof received from said Treasurer a check drawn by said Treasurer upon the First National Bank of Twin Falls, Idaho, for the sum of $570.00 made payable to said Twin Falls National Bank.

That on or about the 29th day of March, 1929, the Twin Falls National Bank cleared said $570.00 check, together with other checks and items with said First National Bank and said First National Bank in settlement of the difference or balance of the clearings drew a draft on the National Copper Bank of Salt Lake City, Utah, for the sum of $656.90, payable to the Twin Falls National Bank and delivered said draft to said Twin Falls National Bank. That the Twin Falls National Bank forwarded said draft to the Federal Reserve Bank at Salt Lake City and said Federal Reserve Bank collected said draft from the National Copper Bank, and thereupon gave said Twin Falls National Bank credit for said sum and thereafter said Federal Reserve Bank paid out all of said sum of $656.90 in satisfaction of drafts drawn by said Twin Falls National Bank upon its account with said Federal Reserve Bank in payment of debts and obligations of said Twin Falls National Bank.

II.

That all of the allegations contained in Paragraph XV of Count VII of plaintiffs' Bill in Equity are true. That all of the allegations contained in Paragraph XV of defendant's Answer thereto are true.

III.

That regarding the allegations contained in Paragraph XVI of Count VII of plaintiffs' Bill in

Equity and the allegations contained in Paragraph XVI of defendant's Answer thereto, the facts are:

That Twin Falls National Bank presented to the County Auditor the Order which it had previously purchased and caused the County Auditor to issue and deliver a warrant to said Bank. That said Bank then presented said warrant to the County Treasurer for payment and the County Treasurer gave said Bank a check drawn upon the First National Bank, as hereinabove set out, in payment of said warrant. That said Twin Falls National Bank did not receive $240.00 or any other sum in money from the Treasurer in payment of said warrant.

COUNTS I TO VII INCLUSIVE.

That in addition to the facts in this stipulation and agreement hereinabove set out, IT IS FURTHER STIPULATED AND AGREED:

That the account of said Twin Falls National Bank in said Federal Reserve Bank on November 2, 1931, was overdrawn. That on November 23, 1931, the date said Bank closed its doors and suspended business operations, said Twin Falls National Bank had to its credit in its account in said Federal Reserve Bank approximately $5000.00 which said account and the whole thereof was by said Federal Reserve Bank appropriated and applied under its general collateral agreement to a reduction of the

debt due from said Twin Falls National Bank to said Federal Reserve Bank.

That the several orders for school warrants which the said Twin Falls National Bank had purchased and which constitute a basis for this action, and which said orders said Bank presented to the County Auditor of Twin Falls County, were forged and fictitious orders and were not the genuine orders of plaintiffs. That said Twin Falls National Bank had purchased said orders in good faith and for valuable considerations and with no notice that they or any of them were forged or fictitious and the said Twin Falls National Bank did not learn that said orders or any of them were forged and fictitious until long after the transactions involved in this case were terminated.

IT IS FURTHER STIPULATED AND AGREED That either party may introduce herein oral or documentary evidence at the time of the trial of this case and that this Stipulation of Facts may be filed in the above entitled cause by either of the parties hereto.

Dated this 28th day of October, 1932.

SWEELEY & SWEELEY,
Attorneys for Plaintiffs.

FRANK L. STEPHAN,
Attorney for Defendant.

(Title of Court and Cause)

STIPULATION

Filed Oct. 31, 1932.

Whereas Common School Districts Nos. 32, 36, 47, 59, and 62 in Twin Falls County, Idaho, have recovered judgments against the Twin Falls National Bank and have presented them to the defendant asking that they be made preferred and paid in preference to the claims of the general creditors of the bank;

And whereas the legal questions involved in such demand and the facts upon which it is based are substantially the same as those in case numbered 1729 now pending for trial in the above entitled court;

And whereas it is deemed advisable by the parties that the claims of all of said school districts should be heard and determined at the same time that case No. 1729 is heard by the court;

It is therefore, by the parties hereto, stipulated and agreed as follows:

That, if satisfactory to the court, the plaintiffs in the action above entitled may file their bill in said proposed suit at any time on or before the day set for the hearing of said case No. 1729, and that on or before said day the defendant may file his answer to said bill, and that such new suit may be

heard and determined in connection with said case No. 1729.

It is further stipulated that any objection which might be made to a misjoinder of parties plaintiff in such proposed new suit is and will be waived by the defendant therein.

Signed this 21st day of September, 1932.

SWEELEY & SWEELEY,
Attorneys for Plaintiffs.

FRANK L. STEPHAN,
Attorney for Defendants.

(Title of Court and Cause)

MEMORANDUM OPINION

Filed Dec. 29, 1932.

SWEELEY & SWEELEY, of Twin Falls, Idaho, attorneys for Plaintiffs.

FRANK L. STEPHAN, of Twin Falls, Idaho, attorney for defendants.

CAVANAH, District Judge:

These two actions were brought by the school districts against the receiver of the Twin Falls National Bank and were presented together as the same questions are involved in each case.

In Action No. 1729, which relates to the alleged claims of School District No. 54, the district urges that it be decreed to have a preferred claim in the sum of $333.88 plus $11.40 costs incurred in the state court, against the money and assets of the Twin Falls National Bank. It appears that the bank, before the insolvency presented to the County Auditor an order of the plaintiff which proved to be a forgery, for a warrant calling for payment from its funds in the hands of the County Treasurer in the sum of $290.00, and a warrant by the Auditor was then issued and delivered to the bank. The warrant was then presented by the bank to the County Treasurer and received in payment a check upon the Twin Falls Bank & Trust Company, payable to the Twin Falls National Bank. Thereafter the Twin Falls National Bank cleared the check together with other checks with the Twin Falls Bank & Trust Company who then drew a draft on the Walker Bank & Trust Company of Salt Lake City for $2203.10, payable to the Twin Falls National Bank. The draft was then forwarded by the defendant, Twin Falls National Bank, to the Federal Reserve Bank at Salt Lake City, which was collected and credit given to the Twin Falls National Bank for said sum, and thereafter the Federal Reserve Bank paid out all the said $2203.10 in satisfaction of drafts drawn on the Twin Falls National Bank upon its account with the Federal Reserve

Bank and in payment of obligations of the Twin Falls National Bank. This was all done prior to the closing of the Twin Falls National Bank.

After the Twin Falls National Bank denied liability to the District for a return of this money suit was brought against it by the district in the state court which resulted in a final judgment in favor of the District. At all times from the time the warrant was presented to the Treasurer and payment made the bank had on hand cash in an amount sufficient to pay in full the claim of the District and on the day it became insolvent and suspended business it had cash on hand in the sum of $7247.74.

The reason urged by the defendant against the allowance and making the plaintiff's claim a preferred one is that it must appear that the funds claimed must be impressed with a trust, that the assets of the bank must have been increased or augmented by the transaction in which the fund was involved and that the district must be able to trace the fund into the hands of the receiver and there identify the same.

Under the facts disclosed by the record it is clear that the Twin Falls National Bank, prior to its suspension of business, received the funds of the district upon a forged order which was paid out of the funds of the district and received and accepted

credit for the amount with the Federal Reserve Bank upon its obligations there. When in doing so it thereby enlarged its assets as the money under such a transaction was traced to its assets and is regarded as the receipt by it of that amount of cash which became a trust fund in the hands of the bank. Merchants' Nat. Bank of Helena, Mont. et al. v. School Dist. No. 8 of Meagher County, Mont., 94 F. 705; Kansas State Bank v. First State Bank, 64 Pac. 634; Allen et al. v. United States, 285 F. 678. The using of the trust fund so wrongfully converted, under the evidence, by the bank in enlarging its assets and who had knowledge of the character of the fund, requires the application of the principle that the fund will be treated as trust property in the hands of the bank at the time it suspended business and the claims of the districts here involved are preferred and should be paid as such out of the assets of the bank. Accordingly decree will be entered with costs.

The evidence relating to the claims of the districts in case No. 1787 is similar to the evidence in the case No. 1729, excepting as to amounts and names of some of the banks upon which checks were issued.

(Title of Court and Cause)

ORDER AND JUDGMENT

Filed Jan. 6, 1933.

Be it remembered that heretofore, to-wit, on the 31st day of October, 1932, the above entitled cause came on for trial by the court at the City of Boise, Idaho, at which time the plaintiffs appeared by Sweeley & Sweeley, their attorneys, and the defendant appeared by Frank L. Stephan, his attorney.

Thereupon the respective parties filed and submitted to the court their signed stipulations as to the facts upon which the claims of the respective plaintiffs in suit herein purport to be based, and oral arguments were made by counsel for said parties. At the close of the argument the case was submitted to the Court subject to the right of counsel to present further briefs if they should so desire.

Now on this 29th day of December, 1932, briefs of counsel having been presented and the court having examined the same and being fully advised in the premises finds from the facts established by the pleadings herein and the stipulations of the parties and the law applicable thereto, that the several claims of the respective plaintiffs which have been filed with the receiver of the Twin Falls National Bank, as set forth in the Bill of plaintiffs,

should be allowed and made preferred as prayed by plaintiffs, and by said receiver paid prior to and in preference to the claims of the general creditors of said bank.

It is therefore by the Court ordered, adjudged and decreed that the claims of the several Common School Districts, Nos. 32, 36, 47, 59, and 62, as set up in their Bill herein and as filed with said receiver, be and the same are, each and all, declared to be and are hereby established as preferred, and that the defendant G. D. Thompson, as receiver of said Twin Falls National Bank be and he is now authorized, ordered and directed to allow and treat each and all of said claims as preferred as prayed by the plaintiffs and to make payment thereof out of the assets of said bank in preference and prior to the claims of said general creditors.

It is further ordered and adjudged by the court that the plaintiffs have and recover of and from the defendant G. D. Thompson, receiver, their costs and disbursements of suit herein taxed at $10.00.

By the Court: Jan. 6th, 1933.

CHARLES C. CAVANAH,
Judge.

(Title of Court and Cause)

STIPULATION

Filed Feb. 22, 1933.

WHEREAS, the above named defendant and appellant has perfected an appeal from a judgment made and entered by the District Court of the United States for the District of Idaho, Southern Division, in cause No. 1729, therein lately pending, wherein the said Common School District No. 54, in the County of Twin Falls, State of Idaho, was plaintiff, and the said G. D. Thompson, as Receiver of the Twin Falls National Bank, Twin Falls, Idaho, was defendant, and said defendant and appellant has likewise perfected an appeal from the judgment made and entered by said District Court in cause No. 1787, lately pending in said District Court, wherein said Common School Districts Nos. 32, 36, 47, 59, and 62, in Twin Falls County, State of Idaho, were plaintiffs, and G. D. Thompson, as Receiver of the Twin Falls National Bank, Twin Falls, Idaho, was defendant, which actions were consolidated by said District Court for trial and involve the same, or substantially the same, facts and legal questions, and it is therefore deemed unnecessary to set out or incorporate in the record on appeal the pleadings, papers or proceedings in more than one of said actions; and

WHEREAS, it will reduce the expense to the litigants and conserve the time of the Circuit Court of Appeals if said causes be consolidated for hearing on appeal upon the same record and briefs;

IT IS, THEREFORE, HEREBY STIPULATED AND AGREED between plaintiffs and defendant, through their respective counsel, as follows:

I. That said causes Nos. 1729 and 1787 shall, with the consent of the Circuit Court of Appeals for the Ninth Circuit, or the presiding judge thereof, be consolidated for the purpose of appeal and for hearing in said Circuit Court of Appeals.

II. That the record and briefs shall contain the consolidated title as used on this stipulation, and that the Clerk may omit the title of pleadings and in lieu thereof insert the words "TITLE OF COURT AND CAUSE" to be followed by the name of the pleading or instrument, and the Clerk may omit the verification of all pleadings and in lieu thereof, wherever the pleading is verified, he shall insert the words "DULY VERIFIED."

III. That it shall be unnecessary to incorporate in the record on appeal in cause No. 1787 any pleadings, papers or documents other than the following:

A. Original Complaint.

B. Answer.

C. Stipulation, dated October 17, 1932.

D. Stipulation of Facts, dated October 28, 1932.

E. Stipulation providing for consolidation of causes in District Court.

F. Memorandum Opinion of District Court.

G. Order and Judgment, dated December 29, 1932.

H. This stipulation.

I. Any order made by the Circuit Court of Appeals for the Ninth Circuit, or the presiding judge thereof, relative to the consolidation of the causes for hearing on appeal or relating to the record on appeal.

J. Petition for Appeal.

K. Order allowing Appeal.

L. Assignments of Error.

M. Citation.

IV. That the complaint and answer in cause No. 1729 for all intents and purposes are the same as the complaint and answer in cause No. 1787 and for said reason counsel deem it unnecessary to have the same made a part of the record on appeal or repeated therein, and it is further stipulated that the record on appeal in Cause No. 1787 mentioned in Paragraph III of this Stipulation and included in Subdivisions C to M inclusive shall relate also to the appeal in Cause No. 1729.

V. That if the Circuit Court of Appeals shall, of its own motion, determine that anything made a part of the record in either action not included in the printed record should have been so included for the information or convenience of the Court, or if either party shall hereafter conclude that any additional part of the record whether certified to said Circuit Court of Appeals or not, should be a part of the printed record, the same may be certified to said Circuit Court of Appeals, and, if required, printed as a supplement to the record, as an expense, in the first instance, of the appellant.

VI. That this stipulation is in lieu of the filing of a Praecipe by defendant and appellant.

DATED this 16th day of February, A. D. 1933.

MARLIN J. SWEELEY,
EVERETT M. SWEELEY,
Attorneys for Plaintiffs and Appellees.

FRANK L. STEPHAN,
J. H. BLANDFORD,
Attorneys for Defendant and Appellant.

(Title of Court and Cause)

ORDER CONSOLIDATING CASES

Filed Feb. 22, 1933.

Counsel for the respective parties above named having stipulated that an order may be entered consolidating the above cases for the purpose of appeal and for hearing in this Court, and good cause appearing therefor,

IT IS ORDERED:

I. That the case of Common School District No. 54, in the County of Twin Falls, State of Idaho, vs. G. D. Thompson, as Receiver of the Twin Falls National Bank, Twin Falls, Idaho, being case No. 1729, be consolidated with the case of Common School Districts Nos. 32, 36, 47, 59, and 62, in Twin Falls County, State of Idaho, vs. G. D. Thompson, as Receiver of the Twin Falls National Bank, Twin Falls, Idaho, being case No. 1787, for hearing in this Court on the appeals heretofore taken in said causes from the District Court of the United States for the District of Idaho, Southern Division, and said causes may be presented upon the record prepared substantially in accordance with the terms of the stipulation on file herein.

II. That the record and briefs shall contain the consolidated title substantially as on this Order, and it shall be unnecessary to incorporate in the

record on appeal any pleadings, papers or documents other than those specified in the stipulation.

DATED this 18th day of February, A. D. 1933.

CURTIS D. WILBUR,
Presiding Judge, United States Circuit Court of Appeals for the Ninth Circuit.

(Title of Court and Cause)

PETITION FOR APPEAL

Filed Feb. 15, 1933.

TO THE HONORABLE CHARLES C. CAVANAH, JUDGE OF THE DISTRICT COURT, AFORESAID:

The above named defendant as Receiver of said Twin Falls National Bank, feeling himself aggrieved by the Order and Judgment made and entered in this cause on the 29th day of December, A. D. 1932, does hereby appeal from said Order and Judgment to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignments of Error, which is filed herewith, and he prays that his appeal be allowed and that a Citation issue, as provided by law, to the above named plaintiffs, commanding them to appear before the Cir-

cuit Court of Appeals for the Ninth Circuit to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers upon which said Order and Judgment was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, California.

That your petitioner was appointed Receiver of said Twin Falls National Bank pursuant to an Act of the Congress of the United States entitled "An Act Authorizing the Appointment of Receivers of National Banks and for other purposes," approved June 30, 1876, and your petitioner is an officer of the United States and this appeal is prosecuted by him in that official capacity under the direction of the Comptroller of the Currency of the Treasury Department of the United States.

And your Petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

Dated this 10th day of February, A. D. 1933.

FRANK L. STEPHAN,
J. H. BLANDFORD,
Attorneys for Petitioner,
Residence and Post Office Address, Twin Falls, Idaho.

(Service acknowledged.)

ORDER ALLOWING APPEAL

The foregoing Petition is hereby granted and the appeal of the defendant is allowed, and it satisfactorily appearing that this appeal is prosecuted by direction of a Department of the Government of the United States the Petitioner shall not be required to give bond for appeal.

Dated this 11th day of February, A. D. 1933.

CHARLES C. CAVANAH,
United States District Judge.

(Title of Court and Cause)

ASSIGNMENTS OF ERROR

Filed Feb. 15, 1933.

Now, on this 10th day of February, A. D. 1933, comes the defendant in the above entitled proceedings, by his attorneys, Frank L. Stephan, Esq., and J. H. Blandford, Esq., and says that the Order and Judgment entered in the above cause on the 29th day of December, A. D. 1932, is erroneous and unjust to the defendant for the following reasons:

I.

The Court erred in finding in its Order and Judgment that the claims of plaintiffs should be

allowed and made preferred and paid by the defendant prior and in preference to the claims of general creditors of the Bank:

1. Because no part of the proceeds of the warrants described in plaintiffs' complaint and no part of the proceeds of any draft or check given in payment of said warrants ever came into the possession or custody of the Twin Falls National Bank or the defendant;

2. Because the funds of the Twin Falls National Bank have not been augmented by the proceeds of said warrants or by the proceeds of any check or draft given in payment of said warrants;

3. Because no part of the proceeds of said warrants or any check or draft given in payment thereof is now in the possession or custody of said bank or the defendant;

4. Because the proceeds of said warrants are not traceable to said Twin Falls National Bank or the defendant but are traceable elsewhere;

5. Because whatever claim plaintiffs may have had against Twin Falls National Bank became merged in the Judgments described in plaintiffs' Bill in Equity and by virtue of said Judgments plaintiffs are entitled to share in

the assets of said Bank only as general creditors.

II.

The Court erred in classifying plaintiffs' claims as Preferred Claims, for the reasons set out in Paragraph I of these Assignments of Error.

III.

The Court erred in giving Judgment in favor of plaintiffs and against the defendant and in causing its Order and Judgment dated the 29th day of December, A. D. 1932, to be entered herein for the reasons set out in Paragraph I of these Assignments of Error.

IV.

The Court erred in making and entering its Order and Judgment because said Order and Judgment is not supported by the pleadings and stipulations in the case.

WHEREFORE, The defendant prays that the Order and Judgment of the District Court of the United States for the District of Idaho, Southern Division be reversed for want of equity and for the reasons set forth in this Assignments of Error, and for such other relief as may be proper in the premises.

Dated this 10th day of February, A. D. 1933.

FRANK L. STEPHAN,
J. H. BLANDFORD,
Attorneys for Defendant,
Residence and Post Office Address, Twin Falls, Idaho.

(Service acknowledged)

(Title of Court and Cause)

CITATION

Filed Feb. 15, 1933.

THE PRESIDENT OF THE UNITED STATES TO COMMON SCHOOL DISTRICTS NUMBERS 32, 36, 47, 59, and 62 IN THE COUNTY OF TWIN FALLS, STATE OF IDAHO, AND TO SWEELEY AND SWEELEY, THEIR ATTORNEYS, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, State of California, within thirty days from the date of this Citation pursuant to an appeal, filed in the office of the Clerk of the District Court of the United States for the District of Idaho, Southern Division, wherein G. D. Thompson, as Receiver of the Twin Falls

National Bank is appellant, and you are appellees, to show cause, if any there be, why the Order and Judgment made and entered against said Appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

WITNESS The Honorable Charles C. Cavanah, Judge of the District Court of the United States for the District of Idaho, Southern Division, this 11th day of February, A. D. 1933.

CHARLES C. CAVANAH,
United States District Judge.

Attest:
W. D. McREYNOLDS,
Clerk of said District Court.

Copy of the foregoing Citation received and service thereof admitted this..... day of Feb., A. D. 1933.

.....

Attorneys for Appellees.

CERTIFICATE OF CLERK

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 137 inclusive, to be full, true, and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit as requested by the Praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $137.50 and that the same has been paid by the appellant.

Witness my hand and the seal of said Court this 13th day of March, 1933.

W. D. McREYNOLDS, Clerk.

(SEAL)

No. 7111

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

G. D. THOMPSON, As Receiver of the Twin Falls National Bank, Twin Falls, Idaho,
Appellant,

vs

COMMON SCHOOL DISTRICT NO. 54, in the County of Twin Falls, State of Idaho,
Appellee.

G. D. THOMPSON, As Receiver of the Twin Falls National Bank, Twin Falls, Idaho,
Appellant,

vs.

COMMON SCHOOL DISTRICTS NOS. 32, 36, 57, 59, and 62, in Twin Falls, County, State of Idaho,
Appellees.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Idaho, Southern Division

FRANK L. STEPHAN,
J. H. BLANDFORD,
Solicitors for Appellant,
Residence: Twin Falls, Idaho.

MARLIN J. SWEELEY,
EVERETT M. SWEELEY,
Solicitors for Appellees,
Residence: Twin Falls, Idaho

No.....

IN THE

United States Circuit Court of Appeals

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vs

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Appellee.

G. D. THOMPSON, As Receiver of the Twin Falls National Bank, Twin Falls, Idaho,
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vs.

COMMON SCHOOL DISTRICTS NOS. 32, 36, 57, 59, and 62, in Twin Falls, County, State of Idaho,
Appellees.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Idaho, Southern Division

FRANK L. STEPHAN,
J. H. BLANDFORD,
Solicitors for Appellant,
Residence: Twin Falls, Idaho.

MARLIN J. SWEELEY,
EVERETT M. SWEELEY,
Solicitors for Appellees,
Residence: Twin Falls, Idaho

TABLE OF AUTHORITIES

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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Appellant,

vs

COMMON SCHOOL DISTRICT NO. 54, in the County of Twin Falls, State of Idaho,

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Appellant,

vs.

COMMON SCHOOL DISTRICTS NOS. 32, 36, 57, 59, and 62, in Twin Falls, County, State of Idaho,

Appellees.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Idaho, Southern Division

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STATEMENT OF FACTS

(Note: Figures in parentheses refer to numbers of pages in Transcript of the Record.)

During the year 1929 Twin Falls National Bank of Twin Falls, Idaho, in good faith, without notice of any irregularities, for valuable cash considerations purchased the forged orders for warrants

which are described in the pleadings and stipulations in the two cases involved in this appeal. Said orders purported in all respects to be genuine orders of the school districts and were directed to the Auditor of Twin Falls County. In each instance the Twin Falls National Bank presented the orders to the County Auditor and he in turn issued warrants drawn on the County Treasury in payment or redemption of the orders. The Bank then took the warrants to the County Treasurer who under the Idaho Law is Treasurer of the Common School Districts within his county, and the County Treasurer in turn redeemed the warrants by drawing and delivering to the Twin Falls National Bank his checks drawn on the Twin Falls Bank and Trust Company or the First National Bank, both of Twin Falls.

The amounts of the several orders involved in case No. 1787 are as follows; $160.00, $212.00, $160.00, $225.00, $225.00, $100.00, and $240.00, or an aggregate of $1322.00 (102, 104, 106, 108, 110, 112, 114). The warrants drawn by the County Auditor in payment of the orders in each instance except in the transaction set out in Count V exceeded the amounts of the several orders due to the fact that the warrants were in payment of the forged orders and other valid orders not in controversy in this case.

The checks delivered by the County Treasurer to the Twin Falls National Bank in payment of the warrants were not presented for payment in cash by the Twin Falls National Bank to the banks upon which they were drawn but were run through the clearing house in settlement of drafts and checks held by those banks against the Twin Falls National Bank.

In the transaction involved in Count I of the Complaint the balance of clearings was in favor of the Twin Falls National Bank and the First National Bank paid that difference by giving the Twin Falls National Bank a check drawn on the National Copper Bank of Salt Lake City in the amount of $774.04 which check the Twin Falls National Bank forwarded to the Federal Reserve Bank at Salt Lake City for collection and credit in the Federal Reserve Bank. (Stipulation 101-102).

In the transaction involved in Count II of the Complaint the balance of clearings was in favor of the Twin Falls National Bank and the Twin Falls Bank and Trust Company paid that balance by giving the Twin Falls National Bank its check drawn on Walker Bank and Trust Company of Salt Lake City in the amount of $2203.10, which check the Twin Falls National Bank forwarded to the Federal Reserve Bank for collection and credit in the Federal Reserve Bank. (104).

And in the transaction involved in Count VII the balance of the clearings was in favor of the Twin Falls National Bank and the First National Bank paid that balance by giving the Twin Falls National Bank its check drawn on National Copper Bank of Salt Lake City in the amount of $656.90, which check the Twin Falls National Bank forwarded to the Federal Reserve Bank for collection and credit in the Federal Reserve Bank. (114-115)

In each of the three foregoing instances the Federal Reserve Bank gave the Twin Falls National Bank credit for the checks forwarded to it. The Federal Reserve Bank did not send any part of the proceeds of the above described checks to the Twin

Falls National Bank but all of the credit built up in the Federal Reserve Bank by virtue of those remittances was exhausted by the payment of drafts drawn by the Twin Falls National Bank upon the Federal Reserve Bank and on November 2, 1931, a date long subsequent to the transactions involved herein, (116) the account of the Twin Falls National Bank in the Federal Reserve Bank was overdrawn.

The Twin Falls National Bank closed its doors November 23, 1931 and thereafter a Receiver was appointed by the Comptroller of the Currency to liquidate its business.

In each of the other four transactions involved in this action (Counts III, IV, V, and VI, Stipulation 106-113) the balance of clearings was against the Twin Falls National Bank and in each of those instances the check which the Twin Falls National Bank had received from the County Treasurer was used by that bank in settling accounts with a local bank of Twin Falls and in addition thereto the Twin Falls National Bank was compelled to pay a remaining balance by drawing its check upon the Continental National Bank of Salt Lake City.

No part of the proceeds of the seven checks drawn by the County Treasurer and delivered to the Twin Falls National Bank ever came into the custody or possession of the Twin Falls National Bank or into the hands of the Receiver of said Bank.

Sometime after the discovery of the forgeries of orders for warrants hereinabove described the school districts brought separate actions in the District Court of the Eleventh Judicial District of the State of Idaho in and for Twin Falls County against the Twin Falls National Bank and in each instance

recovered a judgment against the bank. (48-63).

The judgment obtained against the bank in each instance was for the amount of the forged order for warrant, together with interest thereon at the rate of 7 per cent per annum and costs of suit.

The amounts of the several judgments together with the costs aggregate $1610.37.

After the appointment of the Receiver, claims on the part of the School Districts were presented to and filed with the Receiver. In each instance the claims were for the amounts of the judgments procured in the State District Court.

Following the trial of the case in the United States District Court, Judge Cavanah gave the school districts judgment for the full amount of their claims filed with the receiver and ordered them to be paid in full prior to and in preference to the claims of the general creditors of said Bank.

Cases numbered 1729 and 1787 by leave of Court have been consolidated for the purpose of this appeal.

The issues involved in the two cases are similar. In case No. 1729 the forged order for warrant was in the amount of $290.00 When the Twin Falls National Bank presented the order to the County Auditor the County Auditor executed and delivered to it warrant numbered 28171 in the amount of $502.00 described in the Stipulation on Page 104 of the Transcript, hence, all of the facts necessary to a full and complete determination of Case No 1729 appear in the record of the case numbered 1787.

THE QUESTION RAISED

The issue in this case is whether the plaintiffs are

entitled to have their claims classified as preferred claims and have the funds now in the Receiver's custody impressed with trust characteristics and the claims of plaintiffs paid in full or whether they may be compelled to pro rate with other general creditors.

ARGUMENT.

The Act of Congress (U. S. C. A. Title 12, Sec. 194; R. S. Sec. 5236) which relates to the winding up of the business and affairs of insolvent national banks, provides among other things, that after full provision has been made for reimbursing the United States for advances in redeeming the circulating notes of the bank, the Comptroller of the Currency shall from time to time make ratable dividends to the creditors of the moneys paid over to him by the Receiver. The only preference recognized in the Act is the one given to the United States to make good the deficiency resulting from the redemption of the circulating notes of the bank. Any Balance remaining must then be ratably distributed among the general creditors. In the case of Cook County National Bank vs. United States, 107 U. S. 445, 2 Sup. Ct. 561, 27 L Ed. 537, Justice Field said:

> "The declaration considered in connection with the ratable distribution of the assets, prescribed after such deficiency is provided for, is equivalent to a declaration that no other priority in the distribution of the proceeds of the assets is to be claimed."

The requirement of equal distribution applies only

to assets which belong to the Bank and not to money or property which, although appearing to be the property of the Bank, actually belongs to others and hence the real owners of property or funds held by the Bank or its Receiver, subject to a trust, are not deprived of their right to recover in full the trust fund or so much thereof as can be traced.

Accordingly any person claiming a preference over the general creditors of an insolvent national bank must be prepared to show that there is among the listed assets of the insolvent bank in the hands of the Receiver certain property which is his property either in its original or substituted form. The equities, if any, which prefer or tend to prefer a creditor and allow his claim to be paid in full grow out of his rights in property. His claim must be based upon facts which expressly or impliedly raise or create a trust relationship.

The numerous decisions of the Federal Courts touching upon the ratable distribution of dividends from insolvent national banks are uniform in laying down the prerequisites to the establishment of a preferred claim against the Receiver of a National Bank.

I.

THE FOLLOWING ARE PREREQUISITES TO THE ESTABLISHMENT OF A PREFERRED CLAIM AGAINST AN INSOLVENT NATIONAL BANK:

1. THE FUNDS CLAIMED MUST BE IMPRESSED WITH A TRUST;

2. THE ASSETS OF THE BANK MUST HAVE

BEEN INCREASED OR AUGMENTED BY THE TRANSACTION IN WHICH THE FUND WAS INVOLVED;

3. THE CLAIMANT MUST ALSO BE ABLE TO TRACE THE FUNDS INTO THE HANDS OF THE RECEIVER AND THERE IDENTIFY THE SAME EITHER IN ITS ORIGINAL OR SUBSTITUTED FORM.

In this case the paintiffs did not voluntarily pay or deliver any of its money or property to the Bank as a fiduciary, hence, there was no express trust.

The facts of the case show that the bank purchased the orders for school warrants in good faith for valuable considerations and without notice that the orders were forged or fictitious and when the bank presented the orders to the County Auditor for redemption it did so in good faith and the Auditor in good faith, without knowledge or notice of any defects in the orders issued and delivered the warrants. Likewise, when the warrants were presented to the County Treasurer for payment or redemption that official acted in good faith. None of the acts on the part of the bank or the county officials, acting for the school districts, were tainted with fraud. Hence, the bank cannot be regarded as a trustee ex malefico and consequently only a debtor and creditor relationship has grown out of transactions involved herein.

One of the earliest cases and probably one of the most frequently cited in Federal Jurisdictions, is Beard v. Independent District of Pella City, 88 Fed. 375. In that case the Independent District of Pella City instituted an action against R. R. Beard, Re-

ceiver of the First National Bank of Pella City for the purpose of compelling the Receiver to recognize as a trust fund and pay in full the amount of a balance deposited by the Treasurer of the District. At Page 379 of the opinion, the Court said:

> "The foundation of the right on part of the owner of a trust fund to a preference over general creditors in payment out of a fund or estate that has passed to the assignee or receiver of an insolvent person or corporation is, that the trust fund has been wrongfully confused or intermingled with the property of the insolvent, or has been used to increase the value of the property thereby increasing the amount or value of the funds or estate passing into possession of the assignee or receiver; that, if this intermingling had not taken place, the fund passing to the receiver would have been so much less; that the creditors have only the right to subject the property of the debtor to the payment of their claims, and therefore the creditors cannot complain if the total fund coming into the hands of the receiver is reduced by the amount necessary to make good to the owner of the trust fund the sum which was wrongfully used in augmenting the fund or property passing to the receiver. Unless it appears that the fund or estate coming into possession of the receiver has been augmented or benefited by the wrongful use of the trust fund, no reason exists for giving the owner of the trust fund a preference over the general creditors, and this we understand to be the doctrine recognized by the

supreme court of Iowa and the supreme court of the United States alike. * * * It is open to the school district to assume the position occupied by its treasurer, and, by acknowledging his acts, become a creditor of the bank for the balance shown to be due to the school treasurer; but when the district attempts to avoid the position of a creditor, and to assume that of the owner of a trust fund, and as such to assert a preferential right to payment in full out of the cash fund coming into the hands of the receiver, to the deteriment of the general creditors, it ought to be held to satisfactory proof of the fact upon which the right to a preference rests, to-wit, that the fund coming into the receiver's hands has been augmented and increased by the addition thereto of the trust money, not as a matter of inference, nor as a result of mere entries on books of account, but because the fund or property against which the preference is sought to be enforced has been in fact augmented or benefited by the addition thereto of the trust fund."

In American Can Co. v. Williams, 178 Fed. 420 we find the following:

"The stipulation of facts merely states that the 'assets' of the bank prior to the receivership, and which came into the receiver's hands, exceeded the amount of the plaintiff's claim. No basis whatever is furnished for tracing the misappropriated moneys into the hands of the receiver, or for holding that they were convert-

ed into, or commingled with, any other property or funds in his possession. It is not shown what the assets of the bank consisted of. It may be that the only assets which the receiver obtained were notes and bills receivable—or, perhaps, its banking house—which belonged to the bank before the transactions in question took place. It may be that prior to the receivership the bank used the trust funds to pay its debts with. It may be that these funds were wholly dissipated. There is absolutely nothing to show that they had any connection with any of the property which came into the possession of the receiver. The stipulation of facts is wholly insufficient to show any identity of property followed with the funds sought to be charged against it or to show that the amount of such property was increased or augmented by such funds Indeed, the negative is not shown. It does not appear that if there had been no misappropriated moneys the assets of the bank would have been less.

"While the right to follow misapplied moneys as trust funds into the hands of a receiver has been extended in the modern decisions, there has never been in the federal courts a departure from the principle that there must be some identification of the property followed with the trust funds. Some of the latest cases say that it is sufficient to show that the property in the possession of the receiver has been increased or augmented by the trust funds. But that is only a different way of stating the earlier rule.

It cannot be shown that property in the hands of a receiver has been increased by trust funds unless it is shown that they were converted into or commingled with it."

In the case of Larabee Flour Mills vs. First National Bank, 13 Fed. (2nd) 330 the Court said:

"The real issue in each case is between the preference claimant and general creditors of the bank. They will get less if the preference is allowed. Each claimant asserted an equity, that the assets taken over by the Comptroller are trust funds in which it is a preferred beneficiary. It is difficult to explain or understand by what equitable right one who has not contributed to the creation of a fund should be given a special and superior interest therein, though some of the state Courts seem to so hold. The collecting banks acted as agents, Commercial Bank v. Armstrong, 148 U. S. 50, 13 S Ct. 533, 37 L. Ed. 363, and had they collected and retained the funds called for by the drafts, as was their duty on account of insolvency, the equities of claimants would be plain; but instead of doing so they merely shifted credits on their books and records. No part of the funds in the banks when they failed was placed there by claimants or by any one for them. In each case the draft was paid by check on the insolvent. No additional funds were brought into the bank by either transaction. If the drafts which they held for collection had been paid in currency or by check on some other bank, the

> insolvents' assets would have been increased that much when thereafter their remittance drafts were dishonored; and in that event equity would have regarded the collections as trust funds, followed them into the increased assets and, to the extent of the increase applied them first in discharge of these claims. This is our conception of the rule and the reason for it, applied in the federal courts."

To like effect is the decision in the case of Hirning v. Federal Reserve Bank of Minneapolis, 52 Fed. (2nd) 382.

INTEREST AND COURT COSTS.

As shown by plaintiffs' complaint in this case, their claims which were filed with the Receiver were based not on the orders for warrants, or warrants or upon the County Treasurer's checks given to the Bank, but upon the Judgments which they had obtained in the actions which they prosecuted in the District Court of Twin Falls County, Idaho. Each judgment was for the amount of the order for warrant, plus interest and court costs. The several orders aggregate $1322.00 The amounts of the several judgments based on those orders aggregate $1610.37. The difference is interest and costs. (See Statement of Facts in this Brief).

Upon no theory of the law applicable to a "trust" claim may plaintiffs have a preferred claim for interest and costs. Those items are not trust property, are not traceable to the funds of the bank, nor can they be regarded as having augmented the assets of the bank. Plaintiffs' claims to that extent are

wholly inconsistent with the trust fund doctrine upon which plaintiffs must predicate their claims for recovery And furthermore, the fact that the school districts sought and obtained judgments for interest negatives the notion of a trust relationship. See McNulta v. West Chicago Park Commissioners, 99 Fed. 900, wherein the Court said:

> "A deposit upon which interest must be paid cannot be special or in trust, and, in case of the failure of the bank, must, for the purpose of payment, be on the same footing with other deposits or unsecured demands."

In the case of White v. Knox, 111 U. S. 784, 4 Sup. Ct. 686, 28 L. Ed. 603, Mr Chief Justice Waite said:

> "The only claims the Comptroller can recognize in the settlement of the affairs of the bank are those which are shown, by proof satisfactory to him, or by the adjudication of a competent Court, to have had their origin in something done before the insolvency. It is clearly his duty, therefore, in paying dividends, to take the value of the claim at that time as the basis of distribution. If interest is added on one claim after that date, before percentage of dividend is calculated, it should be upon all, otherwise the distribution would be according to different rules, and not ratably, as the law requires."

See also Merchants National Bank of Helena, Montana, vs. School District No. 8 of Meagher County, 94 Fed. 705, Pages 708-9.

II

TRACING FUNDS INTO THE GENERAL ASSETS OF THE BANK IS NOT SUFFICIENT TO ENTITLE PLAINTIFFS TO A PREFERINTIAL CLAIM.

It is freely admitted by the defendant in this action that the Twin Falls National Bank obtained checks from the County Treasurer in payment of warrants which had been issued and delivered by the County Auditor in redemption of the forged Orders. It may with propriety be argued by the plaintiffs that the checks drawn by the County Treasurer when delivered to the Twin Falls National Bank increased generally the assets of the Twin Falls National Bank. But inasmuch as no funds ever came into the custody or possession of the bank or the Receiver as a result of the several transactions, plaintiffs are not entitled to a preferential claim.

In the case of State Bank of Winfield v. Alva Security Bank, 232 Fed. 847, the plaintiffs sought to hold the defendant banks for funds resulting from the sale by the Cashier of one of the banks of forged notes to the plaintiffs, and in its opinion the Court said:

> "The trial Court was right. The plaintiffs wholly failed to trace the funds after they passed from their hands. Their only attempt to do so consisted of unconvincing evidence combined with an erroneous legal theory. * * * The drafts themselves were not produced, nor was any attempt made to identify the account in which

> they were deposited or to show the state of the account between the time of the deposit and the date of the bank's failure. * * * The capital defect, however, of the plaintiffs' theory is their treatment of the grand division of the bank's assets in those respects known as 'Cash and Sight Exchange' as the fund within the law relating to the following of trust funds. To adopt that theory is to re-establish under a mere bookkeeping disguise the exploded notion that a trust fund may be recovered if it can be traced into the general assets of an insolvent bank. The courts have shown a trend to restrict the 'trust funds' doctrine."

In the case of Macy v. Roedenbeck, 227 Fed. 346, the Court recognizing the same rule said:

> "The modern and more equitable doctrine permits the recovery of a trust fund from one not an innocent purchaser, and into any shape into which it may have been transmuted, provided he can establish the fact that it is his property or that his property has gone into it and remains in a mass from which it cannot be distinguished."

And the Court further says:

> "We recognize the rule only permits the following of the converted property into assets which can be traced as proceeds, and that the lien does not attach to assets in which neither the thing nor its value can be found."

And concluding, the Court in the same opinion further says:

> "There is no pretense in the record that the claimant traced his funds into any assets, either in cash or property, in which said funds were invested, in the hands of the trustee, other than the sum of $426.70 in cash, remaining in the bank upon the date the petition in bankruptcy was filed, and which came into the hands of the Receiver. It appears affirmatively that proceeds of the claimant's collection cannot be found in any of the assets in the hands of the trustee, other than the cash above mentioned."

The case of Board of Commissioners v. Strong, 157 Fed. 49 has been cited in numerous cases as authority on the Trust Fund Doctrine. That case approves the rule announced in Knatchbull v. Hallett, 13 Ch. Div. 696, which will be later referred to in this Brief. The Court recognizes the principle that tracing funds into the general assets of the bank is not sufficient to entitle the claimant to be preferred over the general creditors. We quote from pages 51 and 52 of the opinion:

> "This side of the rule is peculiarly sound when it is sought to obtain an advantage in the distribution of the assets of an insolvent national bank. So long as the claim to advantage is bottomed upon the fact that the Receiver has received money or property into which the money of the claimant is shown to have gone the equity is a strong one, and, to the extent that the assets which have come into the hands of the re-

ceiver are shown to have been augmented by the receipt of the trust fund or its actual proceeds, other creditors should not complain if that is returned to which neither the bank nor its receiver had any just title.

"The equitable principles applicable to the facts of this case must operate to deny any general charge upon either the money or other assets of the bank in possession of the receiver, and deny complainants relief in respect of the moneys in the vaults of the bank when it closed, except insofar as the county has shown, aided by the presumption as to the money used in drawings from the general fund with which the trust fund was blended, that its money has come into the possession of the receiver."

On Page 54 of the opinion the Court further says:

"That the misuse of this trust fund has gone to swell, in one form or another, the general assets of the bank is not sufficient to charge the whole with a lien, will not be seriously contested. The cases which deny such a contention are numerous. To impress a trust upon the property of a tort-feasor who has used the trust fund in his private assets, it must be traced in its original shape or substituted form. (Citing cases) * * * In other courts the question has been presented more squarely for a decision, and supports the rule that an identification of the fund itself, or a tracing into some specific property, is essential to reach the property of a wrong-doer, either in the hands of an as-

> signee, trustee, receiver or under a lien fastened by a creditor."

The same rule is recognized in the case of Empire State Surety Company v. Carroll County, 194 Fed. 593. In that case the Court said:

> "It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof which came to the hands of the receiver."

See also Cuttell v. Fluent, 51 Fed (2nd) 974.

III.

IN ORDER FOR PLAINTIFFS TO ESTABLISH THEIR RIGHT TO PREFERENTIAL PAYMENT OUT OF THE ASSETS OF THE INSOLVENT BANK IT WAS INCUMBENT UPON THEM TO PROVE THAT THE TRUST PROPERTY OR ITS PROCEEDS WENT INTO A SPECIFIC FUND OR INTO A SPECIFIC IDENTIFIABLE PIECE OF PROPERTY WHICH CAME INTO THE HANDS OF THE RECEIVER.

As heretofore pointed out in the transactions set out in Counts III, IV, V and VI (See Stipulation 106-114 Inc.) the balance of the clearings was against the Twin Falls National Bank; only in three of the transactions (See Stipulation 101-106; 114-117) were the balances in favor of the Twin Falls National Bank and the checks which were received from the local banks in making the clearings on those occasions were forwarded to the Federal Re-

serve Bank at Salt Lake City and no money was ever actually received by the Twin Falls National Bank or the Receiver, as a result of those transactions. The entire balance of the Twin Falls National Bank in the Federal Reserve Bank was applied to the payment of drafts drawn by the Twin Falls National Bank upon its account in the Federal Reserve Bank and on November 2nd, 1931, a date considerably later than the transactions involved in this suit the account of the Twin Falls National Bank with the Federal Reserve Bank was overdrawn. The proceeds of the three checks received from the two local banks of Twin Falls in settlement of the balance of clearings were consumed in satisfying the obligations of the Twin Falls National Bank and the transactions in question did not in any sense result in increasing the assets of the bank which were available for distrubution among the creditors.

And likewise, in the four instances, where the balance of clearings was against the Twin Falls National Bank, the four checks were used in balancing accounts or in other words in reducing its indebtedness or liability prior to insolvency, but that fact does not entitle plaintiffs to a lien on the assets of the bank which have come into the hands of the Receiver.

In the case of Dickson v. First National Bank of Buffalo, Oklahoma, 26 Fed. (2nd.) 411, wherein a similar question was raised, the Court in its opinion stated the rule applicable to the tracing of funds in the following language:

> "But even if the plaintiff's position were sustained in this respect by the authorities, he would

not be entitled to a preference for another reason. When the two checks in question were presented by the defendant bank to the Central State Bank of Buffalo, the accounts of these two institutions were adjusted and the balance was given to the defendant in the form of a draft. This draft was forwarded to the Federal Reserve Bank at Kansas City and deposited to the credit of the defendant. The entire balance of the defendant bank in the Federal Reserve Bank was applied on its indebtedness to the Federal Reserve Bank. So that the proceeds of these two checks were consumed in satisfying defendent bank's obligations to the Central State Bank of Buffalo and the Federal Reserve Bank at Kansas City. The ultimate result was that the indebtedness of the defendant bank was decreased to the amount of these two checks. The transaction did not in any sense result in increasing the assets of the bank which were available for distribution to creditors. To grant plaintiff a preference would not be to authorize him to take from the assets something which rightfully belonged to him by reason of his property being wrongfully added to the assets, but it would be to permit him to take from the assets funds which belong to other creditors. Since plaintiff contributed nothing to the assets of the defendant bank, when the failure came, no portion of his funds went into the receiver's hands. The same situation has frequently been presented to this court. In the Empire State Surety Co. v. Carroll County, 194 Fed. 593, it was said:

" 'It is indispensable to the maintenance by a cestui que trust of a claim to preferential payment by a Receiver out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver, and then the claim can be sustained to that fund or property only and only to the extent that the trust property or its proceeds went into it. It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof which came to the hands of the receiver' "

In the case of Farmers National Bank v. Pribble, 15 Fed. (2nd) 175, the Court said:

"The doctrine that a cestui que trust whose property has helped to swell the general assets of a corporation which was or became insolvent, has a prior right or interest in those general assets, without specific identification and tracing of such claimant's property, was again expressly repudiated by this Court in the case last cited. (Referring to Mechanics' and Metals National Bank v. Buchannan, 12 Fed. (2nd) 891)."

And the Court further said:

"The fact that the claimant's property paid or reduced the indebtedness or liability of the insolvent corporation, so that it will pay a

larger percentage of its debts justifies no lien on its assets by or preference in payment to the cestui que trust (1) because such a reduction of the indebtedness does not increase the property or the value of the property of the insolvent; and (2) because the property of the claimant so used to pay a part of the insolvent's general indebtedness or liability never goes into, and therefore cannot be traced into, the property or assets of the insolvent which subsequently came into the possession of the Receiver. (Cases cited)."

In the case of Commercial National Bank v. Armstrong, 39 Fed. 684, at Page 692, the Court said:

"In seeking to follow and impress a trust character upon funds which an agent has misapplied, it is incumbent upon the principal to clearly trace such funds into the hands of the party against whom relief is sought; and so long as the trust fund or property, in either its original or substituted form, can be traced and identified, it may be followed and recovered by the true owner, provided it has not come into the possession of some bona fide holder for value without notice. This right of the principal 'only ceases when the means of ascertainment fails,' or when his property or funds has reached a bona fide holder for value, and without notice of the trust. * * * No well considered case has gone to the extent of holding that when an agent converts or misapplies his principal's property or money and thereafter fails, his general estate will be impressed with a trust

for the reimbursement of such principal, on the ground that such estate has been benefited, and to an equal amount, by the agent's breach of duty. Every creditor could raise a like claim to priority of satisfaction on the same ground. The right of the owner to follow and recover his property rests upon a principle altogether different."

The decision in the foregoing case was affirmed by the Supreme Court of the United States in 148 U. S. 50, 13 Sup. Ct. Rep. 533, 37 L. Ed. 363.

Schuyler v Littlefield, 232 U. S. 707, 34 Sup. Ct. 466, 58 L. Ed. 806, was a proceeding by the plaintiffs to recover trust funds which they claimed they traced into the possession of the trustee in bankruptcy. Relative to the burden of proof in such cases and the tracing of trust funds the Court there said:

"It would serve no useful purpose to make a detailed statement of the testimony. The evidence has been fully discussed by the court of appeals (113 C. C. A. 348-357, 193 Fed. 24-33) in considering this claim of appellants along with that of several other parties seeking, on somewhat similar facts, to trace trust funds into the bank, and thence into collateral which ultimately came into the hands of the trustee. All these claims were disallowed because of the failure to make the requisite proof. Our investigation of the facts leads us to the same conclusion so far as concerns the appellants' claim. They were practically asserting title to $9,600,

said to have been traced into stock in the possession of the trustee. Like all other persons similarly situated, they were under the burden of proving their title. If they were unable to carry the burden of identifying the fund as representing the proceeds of their Interborough stock, their claim must fail. If their evidence left the matter of identification in doubt, the doubt must be resolved in favor of the trustee, who represents all of the creditors of Brown & Company, some of whom appear to have suffered in the same way. Like them, the appellants must be remitted to the general fund."

This Court in the case of United States National Bank of Centralia v. City of Centralia, 240 Fed. 93, recognizes the rule that it was incumbent upon one seeking to reclaim trust property from a Receiver to trace the trust property or its proceeds into a specific fund or into a specific identifiable piece of property in the hands of the Receiver. We quote from Pages 95 and 96 of the opinion:

"The law impresses a trust upon funds so misapplied, and to the extent that the money, or any portion thereof, either in its original or a substituted form, can be traced into the funds which came into the possession of the Receiver, the appellee is entitled to a preference over the general creditors. (Cases cited).

"But it does not appear from the evidence that any of the appellee's money or any property into which it was transmuted, ever came

into the possession of the Centralia Bank, or was in the possession of any of its reserve Banks or other Banks, at the time when the Centralia Bank closed its doors. It is shown that $35,000 of the amount so placed to the credit of the Centralia Bank in the Seattle Bank was transferred from the Seattle Bank to the Centralia Bank's credit in the Bank of California of Tacoma, a reserve agent of the Centralia Bank; but it also appears that thereafter, on July 22d, the account of the Centralia Bank with the Tacoma Bank was overdrawn by $11,423.69 and it is not shown that any of said money came into the Centralia Bank. Between July 13th and July 28th the total of the deposits of the Centralia Bank with the Seattle Bank, including the appellee's money, was $184,102.01. The credit so established was exhausted by the transfer of money to the Bank of California of Tacoma, as above noted, by the transfer of about $20,000 to the Continental Bank of Chicago, a reserve agent of the Centralia Bank, by drafts drawn by the Centralia Bank in favor of its creditors on its account with the Seattle Bank, by the cashing of checks at the Seattle Bank drawn on the Centralia Bank by depositors of that bank, by the Seattle Bank charging to the Centralia Bank certain discount notes, which were either charged to accounts of depositors of the Centralia Bank or were exchanged for renewal notes taken by the Centralia Bank and rediscounted by it with other banks. But none of the appellee's money so deposited in the Seattle Bank is shown to have gone from

that Bank back to the Centralia Bank, or to be traceable into any fund that came into the Receiver's hands"

A similar issue was involved in the case of Cuttell v. Fluent, 51 Fed. (2nd) 974. The Court there said:

"The trust relationship having been established, the depositor may recover such fund or any part thereof insofar as the same can be traced in the possession of the Bank either in its original form or in forms to which it has been converted, or into a general fund with which it has been commingled. It is not sufficient for a cestui que trust to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof and that these assets came into the hands of the Receiver. Although the draft belonged to the Bank, it was a general asset only. No segregation of the draft or its proceeds from the general fund or assets of the Bank had taken place. Here, then, the Administrator to recover must show that the proceeds from the draft directly or by substitution were commingled at some time with the cash fund of the bank which came into the hands of the Receiver. (Cases cited) The record is barren of evidence that any proceeds of the draft, directly or by substitution, at any time were commingled with the cash fund."

Again, on Page 977 of the opinion the Court said:

"The clear proof is that the draft was sent

> to a reserve or a correspondent Bank and may there have been converted into cash. But the tracing of the draft or its proceeds to the correspondent Bank availeth nothing to claimant, as that fund was depleted and overdrawn prior to the time the Bank was taken over by the Comptroller of the Currency."

The latter part of the foregoing excerpt is particularly applicable to the transactions involved in this case wherein the Twin Falls National Bank forwarded the checks received from the other two local banks of Twin Falls to the Federal Reserve Bank of Salt Lake City for collection and credit.

In the case of Sanders v Stevens, 51 Fed. (2nd) 743 the Court on Page 745 of its opinion stated:

> "The further suggestion is made that plaintiff's demand has the elements of a preference claim, in that a reduction in the First National Bank's indebtedness to the Memphis Bank decreased the total of the outstanding claims, and thereby, in effect, increased the value to the general creditors of the assets of the defunct Bank. Several considerations repel this suggestion. First, it seeks to impress a lien upon assets in the hands of the Receiver not because they have been augmented by funds of the plaintiff, but because the total indebtedness of the bank has been reduced and the liabilities of the Receiver diminished, when there is nothing in the record to indicate what any of those amounts are now or were at any time. Second, to supply the missing proof would not change the result, because, since it does not appear that

> any part of the indebtedness to the Memphis Bank was secured by collateral which was surrendered or otherwise, the suggestion would substitute priority for equality to the extent of $1,134.06. * * * Third, and without reference to either of the two preceding reasons, no statute authorizes such a preference, and the equitable doctrine of following trust funds has never been extended to such lengths. On the contrary the proposition has been definitely repudiated. (Cases Cited)."

See also Titlow v. McCormick, 236 Fed. 209; and Dixon v. Hopkins, 56 Fed. (2nd) 783.

IV.

A PERSON CLAIMING A TRUST FUND MUST TRACE IT INTO THE HANDS OF THE RECEIVER OF THE INSOLVENT BANK AND WHERE THE EVIDENCE SHOWS THAT THE FUNDS HAVE BEEN DISSIPATED BY PAYING DEBTS OF THE FAILING BANK PRIOR TO THE RECEIVERSHIP, THERE CAN BE NO PREFERENCE IN THE FUNDS COMING INTO THE HANDS OF THE RECEIVER.

The right of a creditor to pursue and reclaim funds in the hands of a Receiver in charge of a National Bank must rest upon his right of property in said fund. The fundamental principle upon which this right is based is that the property in equity belongs to him and that he has the right to reclaim it. It is not based upon any relationship of debtor and creditor nor upon a debt due and owing,

nor does it rest upon the ground of compensation for the loss of property or fund, nor is it based on the theory of a preference arising by reason of the nature of the claim or the unlawful conversion of the property. A preference can only exist where the title to the property has not passed It is really not a question of preferring one creditor of the Bank over another, or another set of creditors, it is a question of the right of a claimant to recover property to which he holds title. If the claimant is to be permitted to follow and recover his property it must be because he owns it either in its original or in its substituted form. So long as a claimant can trace and identify his property he may reclaim it. But when the means of ascertainment fails the trust fails and when the property has been dissipated there is no reason or logic in allowing him to take the property of another.

In four of the transactions involved in this case the balance of clearings was against the Twin Falls National Bank; the checks which the Bank had received from the County Treasurer, together with other checks having been used in the clearings with the local banks of Twin Falls and consequently no money was received in exchange for the checks. The checks were used to discharge the obligations of the Bank.

It appears to be well-established by a great majority of decisions that where a trust fund is used by an insolvent bank to pay its own debts or to reduce its liabilities the right of a cestui que trust to follow the funds into the hands of the bank's receiver is defeated since such use of the funds amounts only

to a dissipation thereof rather than an augmentation of the assets in the Receiver's hands.

Many cases involving similar issues growing out of the liquidation of National Banks have been presented to the Federal Courts and as a consequence the rules applicable to this type of question seem too well established to admit of any doubt. The rules which are now so generally adhered to, especially by the Federal Courts, are the rules which were first announced in the celebrated English case In Re Hallett's Estate (Knatchbull v. Hallett) 13 Ch. Div. 696. The Supreme Court of the United States has approved the rules laid down in that case in Central National Bank of Baltimore v. Connecticut Mutual Life Insurance Co., 104 U. S. 54, 26 L. Ed. 693. The Circuit Court of Appeals of the Ninth Circuit has likewise approved the doctrine announced In Re Hallett's Estate in its opinion written by Judge Gilbert in the case of Spokane County v. First National Bank of Spokane, 68 Fed. 979. In that case Judge Gilbert said, quoting from Pages 980-981:

> "There is no recognized ground upon which equity can pursue a fund and impose upon it the character of a trust, except upon the theory that the money is still the property of the plaintiff. If he is permitted to follow it and recover it, it is because it is his own, whether in the form in which he parted with its possession, or in a substituted form. Under the earlier rule, he was required to identify it as the very property which he had confided to another. * * *
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> The more recent doctrine, however, follows the rule announced in Re Hallett's Estate (Knatch-

bull v. Hallett) 13 Ch. Div. 696, which is that, if money held by one in a fiduciary character has been paid by him to his account at his banker's, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands, and that if the depositor has commingled it with his own funds at the bank, and has afterwards drawn out sums upon checks in the ordinary manner, he must be held to have drawn out his own money in preference to the trust money, and that if he destroyed the trust fund 'by dissipating it altogether, there remains nothing to be the subject of the trust, but so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust.' "

In the same opinion while considering the right of a claimant to impress the estate of the insolvent with trust features, after the trust fund has been dissipated Judge Gilbert said:

"We are unable to assent to the proposition that, because a trust fund has been used by the insolvent in the course of his business, the general creditors of the estate are by that amount benefited, and that therefore equitable considerations require that the owner of the trust fund be paid out of the estate to their postponement or exclusion. If the trust fund has been dissipated in the transaction of the business before insolvency, it will be impossible to demonstrate that the estate has been thereby increased or better prepared to meet the demands of

creditors, and even if it is proven that the trust fund has been but recently disbursed, and has been used to pay debts that otherwise would be claims against the estate, there would be manifest inequity in requiring that the money so paid out should be refunded out of the assets, for in so doing the general creditors whose demands remain unpaid are in effect contributing to the payment of the creditors whose demands have been extinguished by the trust fund. Both the settled principles of equity and the weight of authority sustain the view that the plaintiff's right to establish his trust and recover his fund must depend upon his ability to prove that his property is in its original or a substituted form in the hands of the defendant. (Cases cited)."

In the case of Anadarko Cotton Oil Co. v. Litteer, 300 Fed. 222 the Court said:

"Plaintiffs right to a preference in the funds in the hands of the receiver rests upon the theory that the funds in the hands of the receiver are trust funds, not belonging to the general assets of the bank, and it is incumbent upon the plaintiff to trace such funds into the hands of the receiver. I think the plaintiff has failed to sustain the burden of proof in this respect. The proceeds of the draft drawn on Buffalo, New York did not at any time come into the possession of the State National Bank, and were not among its funds on hand when it went into the hands of the receiver. The draft drawn on

> Buffalo, New York, was sent to the Commerce Trust Company, and the proceeds used in paying other drafts drawn by the State National Bank, and particularly one drawn in favor of the Fort Worth bank for the $11,000.00. None of the funds at any time found their way back to the State National Bank of Ardmore. * * * At that time, then, the trust funds, if the same ever existed, had been dissipated in paying debts of the State National Bank, and none of the same had come into the possession of the Ardmore bank. Under this state of facts, I know of no rule of law which would give to the plaintiff a preference in the hands of the receiver, and the authorities cited by counsel for plaintiff do not appear to support a right of recovery. It appears to me the rule is well established that the person claiming a trust fund must trace it into the hands of the receiver and that if the evidence shows that the trust funds have been dissipated, even in paying debts of the failing bank, prior to receivership, there can be no preference in the funds coming into the hands of the receiver."

In the case of First National Bank of Ventura v. Williams, 15 Fed. (2nd) 585, at page 588 of the opinion we find the following statement of the law:

> "Counsel for complainant insists that, but for the labor saving device of clearing by the exchange of checks, this check would have been collected in cash and the cash which came into the hands of the receiver would have been aug-

> mented as a result thereof, and that the fact that the clearance was resorted to should not be allowed to deprive him of the advantage which he would have had under a cash collection. The answer to this is that courts must decide cases, not upon suppositions, but upon facts as proven or admitted, and the admitted fact is that cash was not received for the check but that it was used merely to reduce the liabilities of the bank. * * * For the reasons stated I do not think complainant is entitled to have a trust impressed on the cash which came into the hands of the receiver or any preference over the general creditors of the bank but is entitled to prove merely as a general creditor."

In the case of Marshburn v. Williams, 15 Fed. (2nd) 589 the Court said:

> "For the reasons stated in the opinion in the case of First National Bank of Ventura v. Williams (D. C.) 15 Federal 2nd 585 decided this term, and upon the authority of the cases therein cited, it seems clear to me that complainant has failed to trace the proceeds of the bonds into any fund which came into the hands of the receiver, and is not entitled to have a trust declared in his favor but is entitled merely to prove a claim as a general creditor."

Judge Taft while on the Circuit Court of Appeals in the Sixth Circuit wrote the opinion of the Court in the case of City Bank v. Blackmore, 75 Fed. 771. The Syllabus in the case is as follows:

"Plaintiff bank sent a New York draft to the City Bank to be deposited to plaintiff's credit; and the City Bank, which was insolvent, sent the draft to the National Bank, in New York, to be deposited to its credit. The National Bank applied the draft to reduce a debt due it by the City Bank, the draft being paid by the drawees, after some delay, under express directions from plaintiff. Held, that plaintiff was not entitled to payment of the amount of the draft by the receiver of the City Bank as a preferred claim, the amount of the assets for distribution among creditors not having been increased in that amount by the deposit of the draft."

In the body of his opinion Judge Taft said as follows:

"No authority has been cited to show that a claim founded on fraud is entitled to a priority over other claims. It is only where, by the rescission of the contract out of which the claim arises, on the ground of fraud, the specific thing parted with or its proceeds can be sufficiently identified to be returned, that fraud seems to give a priority of distribution. It may not be necessary to show earmarks upon the proceeds of the thing parted with to justify such a remedy, but it must at least appear that the funds in the hands of the receiver were increased or benefited by the proceeds, and the recovery is limited to the extent of this increase or benefit."

In the case of Dudley v. Richards, 18 Fed. (2nd)

876, the plaintiff had left certain bonds in a national bank for safekeeping and the bank wrongfully converted them by depositing them, together with other bonds, with the State Treasurer to secure a deposit of public funds. After the Bank closed the State Treasurer sold all of the bonds to satisfy his claim. The plaintiff claimed a preference and demanded payment in full, contending that by virtue of the trust fund doctrine his claim should be preferred. The Court said on page 878 of the opinion:

> "The recovery was evidently sought and obtained upon the theory that a claimed sum may be recovered as a trust fund if it can be traced into the general balance of the assets over liabilities of an insolvent estate. In State Bank of Winfield v. Alva Security Bank et al 232 F. 847, this court pronounced that theory an 'exploded notion.' It has been expressly and consistently repudiated in this Circuit in a great number of cases. * * *
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> " * * *
>
> "It will be noted that no money, as the proceeds of these bonds, came into the hands of the bank prior to the receivership. It is true that the bonds themselves were received by the bank, and by it delivered to the State Treasurer, as security for the general deposits made by that officer; thus they were converted; but the funds of the bank were not thereby augmented. The theory of augmentation is apparently based upon the fact that the indebtedness of the bank to the state as its depositor was discharged by the proceeds of sale of these and other bonds delivered as security for such deposit."

The Court then quotes from the opinion by Judge Sanborn in the Pribble Case cited elsewhere in this Brief.

In the case of Empire State Surety Company v. Carroll County, 194 Fed. 593, the Court passed upon the same type of question involved in this action and there said:

> "This is a suit in equity against the receiver of a national bank to require him to take from the ratable dividends of other creditors of the bank the requisite amount to pay the County's claim in full. The receiver must make the distribution of the property of this bank in accordance with the provisions of the national banking law. It is the dominant purpose and requirement of that law that, after provision for a redemption of its notes is made, the proceeds of an insolvent national bank shall be equally distributed among its unsecured creditors. So imperative is this provision that it repeals a former act of Congress giving a preference to the United States and annuls a statute of a state giving a preference to deposits of savings banks. (Citing cases). The burden, therefore, is on the sureties to prove clearly that they are entitled on equitable principles to the preference they seek. They proved that the bank took the deposits of the county and of its other depositories in trust for them respectively. But this was not enough. They were also required to prove that these deposits or their proceeds, or a certain part of them, came to the hands of the receiver, for he is liable to cestuis

que trustent to pay trust funds in full only to the extent he receives them. * * * A deliberate consideration of the questions this phase of the case presents and a re-examination of authorities have convinced that these are the rules by which claims of this nature to preferential payments out of the proceeds of the property of an insolvent must be adjudged:

"(1) It is indispensable to the maintenance by a cestui que trust of a claim to preferential payment by a receiver out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver, and then the claim can be sustained to that fund or property only and only to the extent that the trust property or its proceeds went into it. It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the amount and the value thereof which came into the hands of the receiver. (Citing cases)."

In the case of Lucas County v. Jamison, 170 Fed. 338, quoting from Page 348, the Court said:

"Holding, as I do, that the deposits must have been wrongful and a trust created, I still further hold that the funds must be identified, not by 'earmarks' but traced into the estate, and there now found by an augmentation of the estate. If the alleged trust funds have been dissi-

pated, then the cases are at an end; and with but one single exception such are the facts."

To like effect is the holding in Rorebeck v. Benedict Flour and Feed Company, 26 Fed. (2nd) 440.

In the case of Dickson v. First National Bank of Buffalo, Oklahoma, 26 Fed. (2nd) 411 the question of effect of bank clearances was before the Court and the Court disposed of the question in the following manner:

> "Where accounts of collecting and drawee banks were adjusted and draft for balance given the former when checks were presented for collection, and such draft was forwarded to, and deposited to collecting bank's credit by Federal Reserve Bank, which applied collecting bank's entire balance on its indebtedness to the Reserve Bank, owner depositing checks in bank which forwarded it to collecting bank was not entitled to preference or claim to proceeds on later insolvency, as transaction did not increase its assets available for distribution to creditors but merely decreased its indebtedness to Reserve Bank." (Quoting from Syllabus).

TRUST PROPERTY USED TO MAKE BANK CLEARANCES.

It is held by an overwhelming weight of authority that bank checks or drafts representing trust funds run through a clearing house in settlement of claims held by drawee banks against the insolvent bank do not entitle a claimant to a preference against the insolvent bank or its receiver, where the

balance of clearings is in favor of the drawee banks. In the four transactions set out in Counts III, IV, V, and VI in plaintiffs' complaint the balance of the clearings was against Twin Falls National Bank. In each instance the check which the Twin Falls National Bank had procured from the County Treasurer was used to reduce the claims held by the local banks against the Twin Falls National Bank. The final result was merely reducing the bank's indebtedness. There was no augmentation of the funds in the bank and no augmentation of the funds which ultimately came into the hands of the Receiver. Using trust property to diminish the indebtedness or liability of the bank is not equivalent to adding specific or traceable property to its assets.

In the case of Farmers' National Bank v. Pribble, 15 Fed. (2nd) 175, heretofore cited under Point III of this Brief, it appears that the Farmers' Bank had Pribble's draft on an Elevator Company. The Elevator Company was a customer of the People's National Bank. A clearing was had between the two banks on May 10th, 1924, and the People's Bank held the balance of the clearings on that day. Among the checks delivered to the People's Bank on that day by the Farmers' Bank was the said draft on the Elevator Company. The People's Bank accepted payment by the Elevator Company of the draft. The Farmers' Bank received none of the proceeds of the draft but paid the People's Bank the sum of $115.13 to make the clearance. The Farmers' Bank closed on May 12th, 1924. Pribble sued the Receiver of the Farmers' National Bank to establish a preferred claim. The Court said:

"The legal presumption is that that draft and the other checks and drafts on or against the People's Bank which the Farmers' Bank delivered to the People's Bank on May 10, 1924, through the clearance, were delivered to it to pay, and received by that bank in payment of, the checks which were paid by the checks and drafts the Farmers' Bank delivered to the Peoples Bank, and which that bank accepted in payment thereof. Those checks and drafts, in the absence of plenary evidence to the contrary, and there is none, were paid by the clearance, and none of them or of their proceeds ever came to the receiver's hands in the $6,368.66, (the balance taken over by the receiver) because they had been paid by the clearance on May 10, 1924, two days before the bank closed. The result is that the only effect of the use of the draft of $1,046.89 in the clearance and transaction of May 10, 1924, was not in any way to increase the assets of the Farmers' Bank, but possibly perhaps probably, to diminish its indebtedness or liability by the amount of the draft, and such a reduction of its indebtedness creates no preferential trust or lien on the assets of the insolvent over the claims of its general creditors."

The Court then makes the following succinct statement.

"The argument that the use of a trust fund by an insolvent trustee to diminish its indebtedness is equivalent to the use of it to add specific and traceable property to its assets is fallacious. The indispensable requisite of a trust in cases

> of this kind is the ability to take out of the property of the insolvent a traceable, identified part of it, which the insolvent, in violation of its duty as a trustee, has put into it."

In Nyssa-Arcadia Drainage District v. First National Bank, 3 Fed. (2nd) 648, the balance of the clearings was against the insolvent bank and with regard to such a condition, Subdivision 7 of the Syllabus reads:

> "Checks sent to the insolvent bank for collection which after being cleared in usual way resulted in balance against insolvent bank in favor of drawee bank, did not increase funds of insolvent bank and did not entitle owner of checks to priority over other creditors."

And the Court using the words of the trial court said:

> " 'There is nothing to indicate that this amount was separated and kept unmingled with the bank's own money; but, on the contrary, it is conceded that it is undistinguishable from the mass of the bank's own money, and cannot be traced to and identified in the hands of the Receiver. This being so appellant has no better equity than the other creditors of the bank and is entitled to no priority over them."

Other cases on this same point are:

> First National Bank v. Williams, 15 Fed. (2nd) 585;

Burnes National Bank v. Spurway, 28 Fed. (2nd) 40.

Questions similar to the principal questions involved in this case have been before the Federal Court many times, where those Courts have dealt with the questions in an exhaustive manner and it appears that the rule has been uniformly adopted by those Courts that the use of a trust fund by the trustee bank to discharge debts or liabilities of the bank does not augment the bank's assets but amounts only to a dissipation of the trust fund which precludes the right of the cestui que trust to follow the same into the assets of the bank's Receiver.

Where trust funds of a third person have actually been traced into the funds of the bank, and it also appears that the bank has made expenditures from the common fund, the law raises the presumption that the bank made the expenditures from its own funds and that the residue in its vaults represents the trust fund or what is left of it but in order to invoke this presumption in his favor, the owner must show that his funds, either directly or by substitution, came into the bank and were commingled with the cash funds of the bank which came into the hands of the Receiver. (Cuttell v. Fluent, 51 Fed. (2nd) 974). Such presumption, however, cannot be raised in this case for the manifest reason that none of the funds of the plaintiffs actually came into the Twin Falls National Bank or into the custody of the Receiver.

CASH ON HAND AT THE TIME OF BANK'S FAILURE.

It is stipulated between the parties to this action

(100) that at all times between the 15th day of January, 1929, and up to and including November 23, 1931, the date the bank failed, the said Twin Falls National Bank had cash on hand in an amount sufficient to pay in full the claims of plaintiffs in this suit and to pay also the claim of the plaintiff in Civil Case Numbered 1729, and that when the Bank failed it had cash on hand in the amount of $7,247.74. However, inasmuch as no funds of the plaintiffs ever came into the Twin Falls National Bank and such sum or sums of money as were on hand between January 15, 1929 and the date of its closing did not include funds belonging to the plaintiffs the stipulation is in no way helpful to the plaintiffs.

V.

THE ALLOWANCE AND PAYMENT OF CLAIMS AGAINST THE ASSETS OF A NATIONAL BANK IN THE HANDS OF A RECEIVER ARE GOVERNED BY FEDERAL LAWS AND THE DECISIONS OF THE FEDERAL COURTS.

See Act of Congress (U. S. C. A. Title 12, Sec. 194; R. S. Sec. 5236).

In the case of Dickson v. First National Bank of Buffalo, Oklahoma, 26 Fed. (2nd) 411 the Court said:

> "The issue in this case is to be determined by resort to the principles of general commercial law, as defined by the Federal Courts, independent of the State Law on the subject."

In the case of Empire State Surety Company v. Carroll County, 194 Fed. 593, the Court said:

> "The Receiver must make the distribution of the property of this bank in accordance with the provisions of the National Banking Law."

Accordingly, the case of Kansas State Bank v. First State Bank, (Kan.) 64 Pac. 634, relied on by Judge Cavanah as authority for his decision in this case (122) cannot be regarded as reliable authority for determination of the questions involved herein. It is evident from a study of the decisions emanating from the state courts that there is a great variety of holdings on the question of preferred or trust claims and while as was said in Cuttell v. Fluent, 51 Fed. (2nd) 974:

> "The decisions of the state courts are always persuasive, instructive and respected, they are not conclusive."

Hence, where a rule has been so uniformly established by an unbroken current of authority in the Federal Courts as the rule contended for by this defendant, it seems unnecessary to resort to the decisions of the state courts for support.

OTHER CASES CITED IN MEMORANDUM OPINION.

Judge Cavanah in reaching his conclusion also relied upon and cited Merchants National Bank v. School District, 94 Fed. 705, and Allen et al v. United States, 285 Fed. 678.

These cases are distinguishable from the instant case. The facts in those cases are not analogous to the facts in this case. In the Merchants National Bank case the funds in question were deposited in

the bank in a special deposit for a specific purpose known to the bank officials. In his opinion in that case Judge Gilbert said,

> "The officers of the bank knew the $13,056 so received from Palmer was the proceeds of said refunding bonds, and that the same was applicable only to the redemption of the matured bonds."

On the other hand, in the instant case the Twin Falls National Bank had no knowledge or notice that the orders had been forged; they acted innocently and in good faith and had no notice that the bank might be held accountable for their proceeds. (117). Furthermore, in the Merchants National Bank case the money was actually in the bank and remained in the bank and upon insolvency was turned over to the Receiver. In the instant case the funds in question did not come into the hands of the Receiver.

In the case of Allen v. United States, 285 Fed. 678, the Bank had not been designated as a depository for the United States and the Superintendent had no authority and was positively forbidden to deposit the funds in a bank not designated as a depository for the Government. The officers of the bank at the time they received the deposit knew of the character of the funds and under the Federal Statutes were guilty of embezzlement in knowingly receiving the same, and the Court held in its opinion that the circumstances surrounding the deposit made the bank a trustee ex malefico. Those facts are not similar to the facts in the instant case.

VI.

A CLAIM OR DEMAND BEING PUT IN SUIT AND PASSING TO FINAL JUDGMENT IS MERGED IN THE JUDGMENT AND CANNOT THEREAFTER BE USED EITHER AS A CAUSE OF ACTION OR AS A SET-OFF.

As shown by the complaint in this action plaintiffs instituted separate actions in the State Court against the Twin Falls National Bank for conversion of the moneys obtained by the Bank on forged orders. The issues raised in said actions were fully decided by the Court and judgments rendered in each of said actions in favor of these plaintiffs in the respective amounts claimed, together with accrued interest and costs and disbursements of suit. Thereafter the plaintiff districts presented to the Receiver of the Twin Falls National Bank their claims against the Bank based upon their Judgments and in the identical amounts thereof, each amount being the sum converted, together with interest, costs and disbursements of suit. The claims were disallowed as preferred claims and this suit was accordingly instituted.

It is defendant's contention that any claims or rights of actions which plaintiffs had against the Twin Falls National Bank were merged in the Judgments obtained in the State Court and the issues now before the Court in the present actions are res adjudicata. If the plaintiffs obtained the money judgments against the Bank in the State Court, they no longer had claims for the return of specific property, which is the basis of the present actions to establish preferences. They are now estopped

to raise in this action questions which were or could have been adjudicated in the State Court.

We quote from 34 Corpus Juris 752, Paragraph 1163:

> "Doctrine of Merger. A claim or judgment being put in suit passing to final judgment, is merged or swallowed up in the judgment, loses its vitality, and cannot thereafter be used either as a cause of action or as a set-off unless the statute otherwise provides and this rule applies to a final decree in a court of equity. * * *"

34 Corpus Juris 755, Paragraph 1164 further states:

> "New Liability created by Judgment. As a general rule the recovery of a judgment creates a new debt or liability distinct from the original claim or judgment, and this new liability is not merely the evidence of the creditor's claim but is thereafter the substance of the claim itself."

In 34 Corpus Juris 760-761 we find:

> "A final decree on the merits in a suit in equity will operate as a bar to any further litigation between the same parties on the same cause of action in a court of equity. * * * Conversely, a final judgment on the merits in an action at law will bar any further action between the same parties on the same cause of action in a Court of Chancery."

In the case of Virginia Carolina Chemical Co. v. Kirven, 215 U. S. 252, 30 Sup. Ct. 78, 54 L. Ed. 79 the Court said:

> "It is established that the bar of a judgment in another action for the same claim or demand between the same parties extends to not only what was pleaded or litigated in the first action but what might have been pleaded or litigated. If the second action is upon a different claim or demand the bar of the judgment is limited to that which was actually litigated and determined."

By virtue of the money judgments which were obtained in the State Courts the Twin Falls National Bank became a judgment debtor of plaintiffs.

And where a Receiver of a National Bank is appointed by the Comptroller of the Currency, a judgment rendered after the appointment, in an action begun in a state court before the appointment, is binding upon the Receiver as well as upon the Bank. See Bereth v. Sparks, 51 Fed. (2nd) 441, 80 A. L. R. 909.

Therefore, litigation involving the matters pleaded in plaintiffs' complaint herein was fully concluded by the state court actions. The judgments obtained in the State Courts were binding upon the Bank, and its Receiver and were conclusive as to the plaintiffs and the plaintiffs being judgment creditors were general creditors and are required under the Federal Law providing for a ratable distribution to share in the assets of the insolvent only as general creditors.

For a full discussion of the law applicable to all of the issues involved in this case see Annotation in 82 A. L. R. beginning on Page 46,

CONCLUSION.

Upon the foregoing analysis of the facts of this case and the law applicable to the questions raised herein we submit that the Trial Court should have rendered a Judgment in favor of the defendant.

Respectfully submitted,

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Attorneys for Appellant,
Residence and Office,
Twin Falls, Idaho.

Service of the within brief of Appellant acknowledged by receipt of a true and correct copy thereof this.....day of ....., 1933

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.....

Attorneys for Appellees,
Residence and Office,
Twin Falls, Idaho.

No. 711

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

G. D. THOMPSON, As Receiver of the Twin Falls National Bank, Twin Falls, Idaho,
Appellant,

vs

COMMON SCHOOL DISTRICT NO. 54, in the County of Twin Falls, State of Idaho,
Appellee.

G. D. THOMPSON, As Receiver of the Twin Falls National Bank, Twin Falls, Idaho,
Appellant,

vs.

COMMON SCHOOL DISTRICTS NOS. 32, 36, 47, 59, and 62, in Twin Falls, County, State of Idaho,
Appellees.

BRIEF OF APPELLEES

Upon Appeal from the United States District Court for the District of Idaho, Southern Division

MARLIN J. SWEELEY,
EVERETT M. SWEELEY,
Solicitors for Appellees,
Residence: Twin Falls, Idaho

FRANK L. STEPHAN,
J. H. BLANDFORD,
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STATEMENT

Because a number of school districts are united as plaintiffs in Case No. 1787 in which the pleadings are set forth in full in the Transcript, we have thought it best to clarify the situation by stating that the several districts and their claims were thus combined in a single suit through agreement of the parties in order that labor and expense might be saved. Particular attention is called to the fact

that, although the claims of the various Districts are similar, they are not all identical, and no one depends on or is controlled by another, but each should be passed upon and determined separately. To effect a like saving the pleadings in Case No. 1729 in the District Court are omitted from the record herein.

We deem it also important to have it set forth in the statement of facts that as shown by stipulation (Tr. p. 100) the Twin Falls National Bank at all times from and including the time which ante-dates all of the transactions in question, up to and including November 23rd, 1931, "had cash on hand in an amount sufficient to pay in full the claims of the plaintiffs in suit herein, and to pay also in full the claim of plaintiff in suit in case numbered 1729 in the above named Court and that on the date last stated, being the date when said Bank became insolvent and ceased doing business, it had cash on hand in the amount of $7,247.74." and that on the date last mentioned it "had to its credit in its account in said Federal Reserve Bank approximately $5000." (Tr. 116).

The statement of counsel for appellant at page 6 of their brief that "No part of the proceeds of the seven checks drawn by the county treasurer and delivered to the Twin Falls National Bank ever came into the hands of the Receiver of said Bank," cannot be accepted either as a statement of fact or a conclusion of law. The claim, so made, that no part of the proceeds of the checks referred to ever came into the custody or possession of the Bank is fully controverted and its error proven by the record herein which shows by Exhibits A, B, C, D and E,

being copies of judgments entered by the State Court in favor of these Districts in suits to recover from the Bank the money unlawfully taken from them, that the proceeds of the checks came into the possession of the Bank. (Tr. 48 to 63 inc.). More than this, in his answer to the Bill of Appellees Tr. 67, 72, 77,, 87, 88, 92) the appellant admits that these suits were commenced and that judgments were entered therein against the Bank as alleged.

That portion of the statement complained of, that no part of the proceeds of the checks ever came into the hands of the receiver of the Bank, is not admitted by appellees, that being one of the principal questions in these cases, and perhaps the controlling question, to be passed upon by this Court.

POINTS AND AUTHORITIES

First. The funds of the School Districts, named as plaintiffs in the two actions brought here on appeal, were withdrawn from their treasury upon warrants issued to the Bank which were based on forged orders. Being thus wrongfully taken they became trust funds in the hands of the Bank.

Transcript, page 117.
Appellant's Brief, pp. 4, 6.
San Diego County vs. California National Bank, 32 Fed. 59.
Merchants National Bank vs. School District, 94 Fed., 705.
Ind. Dist. vs. King, 80 Ia., 497; 45 NW, 908.
Board vs. Patterson, 149 Fed., 229.

Second. That the Twin Falls National Bank be-

came liable to the School Districts for the money taken from their treasury was settled in the cases of

> Common School District No. 27 vs. Twin Falls National Bank, 50 Ida., 668; 299 Pac. 662, and
> Common School District No. 61 vs. Twin Falls Bank & Trust Company, 50 Ida., 711; 4 Pac. (2nd), 342.

involving like questions, and also by the judgments entered against the Bank in favor of the several districts by the Idaho State Court, evidenced by the exhibits attached to Appellees' Bill herein. (Tr. pp. 48 to 63).

Third. The moneys so wrongfully taken from each of the several school trustees, as between the District and the Bank, became a trust fund held by the Bank as trustee, and the district was,, and is, entitled to recover it as a preferred claim for (a) it was commingled with other moneys and credits of the Bank; (b) the Bank at all times had on hand cash in an amount sufficient to pay in full the claims of all the appellees; and, (c) at the time of the failure of the Bank it had on hand cash in the sum of $7,247.74, (Tr. 100), which went into the hands of the receiver, being more than the aggregate of the claims of appellees.

Fourth. Where money held in trust is by the trustee mingled with funds of his own so that its

identity is lost the entire property is impressed with the trust.

Frelinghuysen vs. Nugent 36 Fed. 229.
Beard vs. Ind. Dist., 88 Fed., 375.
Merchants Nat. Bank vs. School District, 94 Fed., 705.
Board vs. Patterson, 149 Fed., 229.
Smith vs. Mottley 150 Fed., 266.
Board vs. Strawn, Receiver, 157 Fed., 49.
Allen vs. U. S. 285 Fed., 678.
Am. Surety Co., vs. Jackson, 24 Fed. (2nd), 768.
National Bank vs. Insurance Co., 104 U. S., 54; 26 Law Ed., 693.
Peters vs. Bain, 133 U. S., 670, (704); 33 Law Ed., 696.
First National Bank vs. Fidelity & Dep. Co., 48 Fed (2nd), 585.
Trestrail vs. Johnson, 298 Pa., 388; 148 Atl., 493.
Tooele County Board vs. Hadlock, 11 Pac. (2nd), 320. (Utah).

Fifth. It is presumed that where a trustee pays out money from a fund made up of his own and that belonging to the trust, such payments are from his own and that the portion remaining belongs to the trust.

Standard Oil Co. vs. Hawkins, 74 Fed., 395.
Merchants National Bank vs. School District, 94 Fed., 705.

Board etc. vs. Strawn, Receiver, 157 Fed., 49; 15 L. R. A. (N. S.) 1100.
Macy vs. Roedenbeck 227 Fed., 346.
Allen vs. U. S. 285 Fed. (C. C. A.) 678.
Skinner vs. Porter 45 Ida. 530; 263 Pac. 993.
Waddell vs. Waddell 36 Utah, 435; 104 Pac. 743.
Woodhouse vs. Crandall, Receiver, 197 Ills., 104; 64 NE. 292.
Blythe vs. Kujawa, 60 A. L. R., 330; 220 NW, (Minn.).
Ind. School District vs. King, 80 Iowa, 497; 45 NW, 908.
State vs. Bank of Commerce 54 Nebr. 725; 75 NW, 28.

Sixth. Interest at the legal rate is to be charged to the trustee of the trust fund from the time of its receipt up to the time an accounting is demanded.

Idaho Code Annotated, Section 26-1904.
15 R. C. L., Page 10, Sec. 8.
Luke vs. Kettenbach, 32 Ida., 192; 181 Pac., 705.
In Re Seward, 37 A. L. R., 441. (Notes to, beginning at page 459).
Same case in 105 Nebr., 787; 181 Pac., 941).
In Re Reed, 55 A. L. R. 941; 259 Pac. (Wyo.) 815.

Seventh. The Court costs in all of the suits brought by the school districts against the Bank, in which the judgments were entered, were all incur-

red before the insolvency of the Bank and are properly a part of the several claaims.

These costs were made necessary by sections 3702, 3704 and 3712 of Idaho Compiled Statutes.

ARGUMENT

If we understand their position correctly, counsel for appellant are relying on the assumption that **the money** of the School Districts did not come into the hands of the Receiver, and hence that the appellees are not entitled to a preference in the payment of their claims. Apparently their contention is that **the money** of the School Districts was all dissipated before the Bank failed, leaving nothing to which a trust could attach.

When it is borne in mind that in this action we are not dealing with any **specific property**, that no actual cash in the way of national currency, national bank bills, Federal Reserve notes, gold or silver certificates, gold or silver coin, was or is involved, but that, as in nearly all financial transactions of today, the case features **credits**, it will be seen that the position of the appellant is not sound.

The appellees say, and the undisputed facts are that no actual cash in specific kinds of money belonging to them was taken or converted by the Bank, but that their funds were by the Bank depleted, their credit balances reduced. It is our contention, and we think it is sustained by both reason and authority, that when the Bank took from the County Treasurer, acting as the Treasurer of the

School Districts, checks in payment of the warrants based on orders admitted to have been fraudulent, and mingled the money thus obtained with its own funds, as it did, so that its identity was lost, the entire assets of the Bank, of whatsoever kind, wherever situated, and however held, were then impressed with a trust in favor of the appellees. Thereafter it was the duty of the Bank to so handle its money and property as to have on hand an amount from which the claims of the School Districts could be paid.

Counsel for appellees do not deem it necessary or expedient to encumber the pages of this brief, or impose on the Court what to them seems to be unnecessary work, by multiplying cases in which the points they have suggested have been many times passed upon, as shown by the authorities listed. They do not consider it an open question as to whether the funds of the School District taken from them without warrant of law, became trust funds in the hands of the Bank, or that proof to that end, by specific reference to the authorities or the making of quotations therefrom is called for, but pass directly to the obligation of the Bank in regard to those funds. In our opinion the law relating to the facts applicable to the several claims in suit in these two cases is set forth succinctly in the opinion of the Court in the case of

Board, etc. vs. Patterson, 149 Fed. 229,

as follows:

> "We discover that in the first place identification of a trust fund is complete where moneys

are found in the hands of the trustee who has mingled his own funds with the trust fund, and that the remaining fund, if not in excess of the trust fund will be deemed to be that portion of the trust fund which the trustee has not touched, because belonging to the trust; and in the second place, that if the trust fund has been mingled with the body of the trustee's estate, and the trust fund or any part of it has been converted into other specific forms of property which can be discovereed and followed, and which passed into the hands of the assignee, receiver or trustee, that property will be turned over to the beneficiary of the trust, or, if the trust fund has been mingled with the funds of the trustee and has been invested along with the trust fund in assets which have come into the hands of the receiver or assignee, then the trust fund is made a charge against the entire mass of the assets in the acquisition of which the trust fund, together with the other property of the trustee, was used."

Another case in which the rule for which we are contending is announced is that of

Macy vs. Roedenbeck (C. C. A.) 227 Fed. 346.

In that case the Court stated the law to be:

"Where a trustee mingles funds and makes payment out of the common fund, there is a sufficient identification of the remainder, not exceeding the smallest amount the fund contained

subsequent to the commingling, because the legal presumption is that he regarded the law and neither paid out nor invested in other securities or property the trust fund, but kept it sacred."

The case of

Allen Bank Commissioner vs. U. S., 285 Fed. 678 (C. C. A. for 1st Circuit),

was one in which a bank had received a deposit of money that could not lawfully be made. The Bank at all times had cash on hand in excess of the deposit. The Court held that the cash that passed into the hands of the Receiver was impressed with a trust in favor of the rightful owner of the deposit, being the United States. In its opinion the Court said:

"As to the other deposits, it is agreed that the trust company had on hand at all times after said money was deposited and when possession was taken by the Commissioner, cash assets in its commercial department exceeding the amount of both of said accounts. Under these admitted facts it is a presumption of law that the trust fund is included in the cash assets in its commercial department, and has never been wrongfully appropriated."

"While the burden is upon the beneficiary to trace the trust fund, we think under the circumstances in this case it has been done, and that the cash effects in the commercial depart-

ment of the trust company which have come into the possession of the Commissioner are impressed with a trust in favor of the United States for the full amount of $12,520.79."

In the case of Trestrail vs. Johnson, 148 Atl. 403; 298 Pa. 388,

the Court announced the law to be as follows:

"Where trust funds are mingled with personal funds under an account designed as a trust fund account, the entire mass will be considered as trust funds until the demands of the trust are satisfied. When dollars are traced into an account, the identical dollars need not be located. Where the agent has mingled his own property with that of the principal, the latter may claim from the admixture an amount equal to his own, although it may not be the same identical property."

In the case of

American Surety Co. vs. Jackson, 24 Fed. (2nd) 768,

the Court said:

"In Smith vs. Mottley, 150 Fed. 266, the Circuit Court of Appeals for the 6th District held that the burden of showing that his property had been wrongfully mingled with the mass of property of the wrongdoer was on the owner who sought to follow it, and when this was done

the burden shifts to the wrongdoer to show that the money or property has passed out of his hands, and that his trustee in bankruptcy stood in the same position."

"This was reaffirmed in Board of Commissioners vs. Strong, 157 Fed. 49. It will thus be seen that the rule itself rests largely on a legal fiction. But if there is a presumption that trust funds have not been wrongfully misapplied or criminally used by the officers of the bank, as held by this court in the Spokane County case, **supra,** and such a presumption no doubt obtains, it would seem to follow as a necessary correllary that the burden was on the bank or its successor in interest to prove that the trust funds, or some of them, were in fact wrongfully misappropriated or criminally used by the bank."

Concerning the right to follow a trust fund where it had become commingled with other money or property the Supreme Court of the United States in the case of

Central National Bank of Baltimore, vs. Connecticut Mutual Life Ins. Co., 104 U. S., 5, (26 Law Ed., 693).

held:

"That so long as trust property can be traced and followed into other property into which it has been converted, the latter remains subject to the trust, and that if a man mixes trust

> funds with his own the whole will be treated as the trust property except so far as he may be able to distinguish what is his own, are established principles of equity and apply in every case of a trust relation, and to moneys deposited in a bank account and the debt thereby created, as well as to every other description of property."

In the case of:

Peters vs. Bain, 133 U. S. 670, (33 Law Ed., 704), the Supreme Court quotes, with evident approval, a holding of a Federal Court, as follows:

> "It was said by Mr. Justice Bradley in Frelinghuysen v. Nugent , 36 Fed. Rep. 229, 239: 'Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it, the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase or sale. But if it became confused with other property of the same kind so as not to be distinguishable without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority right over the other creditors of the possessor."

We believe the law to be well settled in both Federal and State courts that where trust funds are by the trustee mingled with those of his own so that their identity is lost the whole fund is impressed with the trust, and upon that assumption contend that upon the facts relating to the several claims in suit herein each of the claimants is entitled to the relief asked for and to that end that the orders and judgments of the District court should be affirmed. In support of that contention we apply the law to the facts which are not disputed.

The beginning of all of the claims of the appellees in both cases are alike. They grew out of the purchase by the Bank of what purported to be orders of the Districts for warrants, but which proved to be forgeries.

AS TO THE FIRST CLAIM OF DISTRICT NO. 32.

The purported order was in the amount of $160. It was by the Bank presented to the county treasurer and that official drew and delivered to the Bank a check on the First National Bank of Twin Falls in the amount of $575.25 "for the payment and redemption of said $160 warrant and other warrants." (Tr. 102).

The check so received was by the Bank "cleared together with other checks and items, with said First National Bank and said First National Bank in settlement of the difference or balance of the clearings drew a draft upon the National Copper Bank of Salt Lake City, Utah, for the sum of $774.04 payable to the Twin Falls National Bank and delivered said draft to

said Twin Falls National Bank. That said Twin Falls National Bank forwarded said check to the Federal Reserve Bank at Salt Lake City and said Federal Reserve Bank collected said draft from said National Copper Bank and thereupon gave Twin Falls National Bank credit for said sum * * ."

There were thus three comminglings of the fund of $190 belonging to the School District with the funds of the Banks; first, in the check for $575.25 issued in redemption of the $190 "and other warrants"; second, in the settlement of the clearing house difference by the taking of a draft on a Salt Lake City Bank in the amount of $774.04; and, third, in receiving with its Salt Lake correspondent credit for the amount of that draft. Either was sufficient to completely destroy the identity of the funds of the School District. At all times after these transactions until the failure of the Bank, during a period of two years, the Bank had on hand in cash enough to pay in full all of the claims of the several District, and when it closed its door had in cash $7247.74, and with its Salt Lake correspondent "approximately $5000." There should be no question that this claim is entitled to a preference.

AS TO THE SECOND CLAIM OF DISTRICT NO. 32.

The purported order was in the amount of $212. (At pages 69, 70 71 and 72 of the Transcript the amount appears as $112. At pages 51 and 104 of the Transcript it is given as being $212, and at page 4 of the brief of counsel for appellant it is listed, correctly, as $212).

It was by the Bank presented to the county treasurer who drew and delivered to the Bank a check in the amount of $502, in payment of an order for $212 and another in the amount of $290, payable to the Bank.

The $502 check was by said Twin Falls National Bank cleared, "together with other checks and items with the Twin Falls Bank & Trust Company and said Twin Falls Bank & Trust Company in settlement of the difference or balance of the clearings drew a draft on the Walker Bank & Trust Company of Salt Lake City, Utah, for the sum of $2203.10, payable to the Twin Falls National Bank and delivered said draft to the said Twin Falls National Bank. That said Twin Falls National Bank forwarded said draft to the Federal Reserve Bank at Salt Lake City and said Federal Reserve Bank collected said draft from the Walker Bank & Trust Company and thereupon gave said Twin Falls National Bank credit for said sum, * *." (Tr. 104).

The other order, being one for $290 which was combined with the one for $212 mentioned above, making the $502 for which the check was given, purported to have been issued by School District No. 54. There was thus a commingling of two trust funds and two comminglings of these funds with those of the Bank, first, by the taking from the Twin Falls Bank & Trust Company in settlement of the clearing house operations of the draft for $2203.10, and, second, by receiving with its Salt Lake correspondent credit for the amount of that draft. The order and judgment of the District Court giving the sec-

ond claim of District No. 32 a preference is right and should be affirmed.

AS TO THE CLAIM OF SCHOOL DISTRICT NO. 36.

The purported order was in the amount of $160.00. It was by the Bank presented to the county auditor who issued to the Bank a warrant for $269.08, including "another order or other orders," for $107.78. The Bank then presented said warrant to the county treasurer and from that official obtained a check upon the Twin Falls Bank & Trust Compaany for $267.78 The Twin Falls National Bank cleared that check "together with other checks and items, with the Twin Falls Bank & Trust Company and said Twin Falls National Bank, in settlement of the difference or balance of the clearings drew a draft on the Continental National Bank of Salt Lake City for the sum of $1311.98, payable to the Twin Falls Bank & Trust Company which draft was thereafter and in due course collected by said Twin Falls Bank & Trust Company." (Tr. 106, 107). The identity of the funds of the School District was not only lost through their being commingled with the funds of the Bank in the check received by the Bank from the county treasurer, which of itself entitled the District to the preference allowed it by the District Court but there is nothing in the record to show that the funds of the District were made use of in the issuance or payment of the draft drawn on the Salt Lake bank. In the absence of such a showing the presumtion controls that the school district's fund remained on hand.

AS TO THE CLAIM OF SCHOOL DISTRICT NO. 47.

The purported order was in the amount of $225. It was by the Bank presented to the County Auditor who issued to the Bank a warrant for the payment of the order "and another order or orders for warrants." The Bank presented the warrant to the county treasurer who issued to the Bank a check on the Twin Falls Bank & Trust Company in the amount of $500 "which was for the payment and redemption of said above described warrant."

The Twin Falls National Bank cleared said $500 check, together with other checks and items, with said Twin Falls Bank & Trust Company and said Twin Falls National Bank in settlement of the difference or balance of the clearings drew a draft upon Continental National Bank of Salt Lake City, Utah, for $3917.52 payable to the Twin Falls Bank & Trust Company and delivered said draft to said Twin Falls Bank & Trust Company and said Twin Falls Bank & Trust Company thereafter in due course collected the same." (Tr. 108, 109).

The identity of the funds of the School district was not only lost through their being commingled with the funds of the Bank in the check received by the Bank from the treasurer, which of itself entitled it to the preference allowed it by the District Court, but there is nothing in the Record to show that the funds of the District were made use of in the issuance or payment of the draft drawn on the Salt Lake bank. In the absence of such a showing the presumption controls that the school district's funds remained on hand.

AS TO THE CLAIM OF SCHOOL DISTRICT NO. 59.

The purported order was in the amount of $225. A warrant issued for that sum and a check on the First National Bank of Twin Falls in payment for the same amount was by the treasurer given to the Bank. The Bank cleared the check, "together with other checks and items with said First National Bank and said Twin Falls National Bank in settlement of the difference or balance of the clearings drew a draft upon the Continental National Bank of Salt Lake City, Utah, for the sum of $559.25, payable to said First National Bank and delivered said draft to said First National Bank and said First National Bank thereafter in due course collected the same."

The record does not show that the funds of the school district were made use of in the issuance or payment of the draft drawn on the Salt Lake Bank, and in the absence of such a showing the presumption controls that the school district's money remained on hand.

AS TO THE FIRST CLAIM OF SCHOOL DISTRICT NO. 62

The purported order was in the amount of $100. It was by the Bank presented to the county auditor who issued to the Bank a warrant in payment of the order "and another order or orders for warrants." The treasurer gave to the Bank a check on the Twin Falls Bank & Trust Company in the amount of $151.69 "for the payment and redemption of said above described warrant." The Twin Falls National Bank "cleared said $151.69 check together with

other checks and items with said Twin Falls Bank & Trust Company and said Twin Falls National Bank in settlement of the difference or balance of the clearings drew a draft upon the Continental National Bank of Salt Lake City, Utah, for the sum of $4024.00, payable to said Twin Falls Bank & Trust Company, and said Twin Falls Bank & Trust Company thereafter in due course collected the draft."

The identity of the funds of the school district were not only lost by being commingled with the funds of the Bank in the check received by the Bank from the county treasurer, which of itself entitled it to the preference given it by the District Court, but there is nothing in the record to show that the funds of the District were made use of in the issuance or payment of the draft drawn on the Salt Lake Bank. In the absence of such a showing the presumption controls that the funds of the school district remained on hand.

AS TO THE SECOND CLAIM OF SCHOOL DISTRICT NO. 62.

The purported order was in the amount of $240. The Bank caused the county auditor to issue to it a warrant for the payment of that order "and another order or orders," and thereafter presented said warrant to the treasurer and from that official received a check on the First National Bank of Twin Falls for the sum of $570, payable to said Twin Falls National Bank in payment of said warrant.

The Twin Falls National Bank cleared said $570 check, "together with other checks and items with said First National Bank and said First National

Bank in settlement of the difference of balance of the clearings draw a draft on the National Copper Bank of Salt Lake City, Utah, for the sum of $656.90, payable to the Twin Falls National Bank. That the Twin Falls National Bank forwarded said draft to the Federal Reserve Bank, at Salt Lake City and said Federal Reserve Bank collected said draft from the National Copper Bank and thereupon gave said Twin Falls National Bank credit for said sum * * ." (Tr. 114, 115).

There were three comminglings of the fund of $240 belonging to the school district with the funds of the Bank; first, in the check for $570 issued in redemption of the $240 "and other warrants" second in the settlement of the clearing house difference by the taking of a draft on the Salt Lake City bank in the amount of $656.90; and, third, in receiving with its Salt Lake correspondent credit for the amount of that draft. Either was sufficient to completely destroy the identity of the funds of the school district, and entitles it to the preference in payment ordered by the District Court.

AS TO THE CLAIM OF SCHOOL DISTRICT NO. 54 (IN CASE NO. 1729).

The purported order was in the amount of $290. It was combined with one for $212, purporting to have been issued by District No. 32, (heretofore mentioned), making a total of $502 for which the Bank obtained a warrant from the county auditor. The Bank presented that warrant to the county treasurer and from that official received a check on the Twin Falls Bank & Trust Company for $502.

That check was cleared with the Twin Falls Bank & Trust Company and in the settlement the Twin Falls National Bank received from the Twin Falls Bank & Trust Company a draft on the Walker Bank & Trust Company of Salt Lake City, in the amount of $2203.10, payable to the Twin Falls National Bank. That draft was collected by the Federal Reserve Bank of Salt Lake City and by that bank its amount was credited to the Twin Falls National Bank. (Tr. 120, 104).

The other order, being the one for $212, which was combined with this one, making $502 for which the warrant was given, purported to have been issued by school district No. 32, as stated in connection with the second claim of that district. There was thus a commingling of two trust funds and two comminglings of these funds with those of the Bank. First, by the taking from the Twin Falls Bank & Trust Company in the settlement of the clearing house operations, of the draft for $2203.10, and, second by receiving with its Salt Lake City correspondent credit for the amount of the draft. The order and judgment of the District Court giving the second claim of District No. 62 a preference is right and should be affirmed.

AS TO THE QUESTION OF INTEREST

Appellant contends that interest on the claims of the school districts should not be allowed. That the Bank should be held for interest at the legal rate (being 7 per cent in Idaho) from the time the funds were taken by it up to the date of its insolvency, is sustained by authorities. The Idaho statute is

"When there is no express contract in writing fixing a different rate of interest, interest is allowed at the rate of seven cents on the hundred by the year on * * *

"5. Money received to the use of another and retained beyond a reasonable time without the owner's consent, express or implied."

Idaho Code Annotated, Section 26-1904.

"Interest on a trust fund is recoverable where the money claimed has actually been used or is improperly retained by the trustee."

15 R. C. L., Page 10, Sec. 8.

"Where a guardian mingles his ward's funds with his own, and it is not shown that he received any profit from the use of the ward's funds, the guardian should be charged with interest at the legal rate with annual rests, on the amount of the funds of the ward so mingled with his own."

Luke vs. Kettenbach, 32 Ida., 192; 181 Pac. 705.

"Practically the same situation exists in case of a mingling of trust funds as in case of failure to invest. There is an inclination shown in a large number of cases to charge the guardian or other trustee who has mingled the trust funds with his own, or has used such funds in his private affairs, with the legal rate where it is not

shown a larger profit was realized therefrom."

Note to:

In Re Seward, 37 A. L. R. 441 (p. 459). Same case reported in 105 Neb. 787; 181 Pac. 941).

"In Perry on Trusts, Vol 1, Sections 468, he there summarizes the rule applying in the United States as follows:

> " 'If a trustee retains balances in his hands which he ought to have invested, or delays for an unreasonable time to invest, or if he mingles the money with his own, or uses it in his private business, or deposits it in bank in his own name or in the name of the firm of which he is a member, or neglects to settle his account for a long time, or to distribute or pay over the money when he ought to do so, he will be liable to pay simple interest at the rate established by law as the legal rate in the absence of special agreement. * * * If the trustee cannot show what amount of interest he has received, he shall be charged with legal interest from the time when the regular investment ought to have been made.'
>
> "The cases on the subject are collected in a note in 37 A. L. R. 359, 465, and clearly show that the executor in this case cannot be charged with less than the legal rate as above mentioned."

In Re Read, 55 A. L. R. 941; 259 Pac. (Wyo.) 815.

The principal business of a bank is the loaning of money and the charging of interest and there would appear to be no reason why it should be allowed to obtain money, illegally, from another and not account for at least the legal rate of interest.

The school districts, by their claims filed with the receiver, are not asking for interest for the time elapsing from the time the judgments were entered in their favor against the Bank, which was December 8th, 1931. The Bank closed its doors on November 21st of that year. Upon consideration we do not believe that interest on the claims for the intervening period, being 17 days, is properly chargeable, and on behalf of the districts give consent to the making of that reduction, but contend that aside from that small allowance the several claims are correct as filed.

AS TO THE MATTER OF THE JUDGMENTS ENTERED BY THE STATE COURT AND THE COSTS INCLUDED THEREIN.

Counsel for appellant call attention to the showing that judgments were entered by the State Court against the Bank in favor of the School Districts on their claims for the money taken from them by the Bank, and urge that by that course they so changed the character of their claims as to lose their right to have them preferred.

It will be noted that the suits which resulted in the judgments were commenced prior to the insolvency of the bank, while it was a going concern, so that

the question of preference was not in any manner involved or of any importance. Those suits were not brought to recover any specific property, or to get back the identical money obtained by the Bank, but to recover what had been taken, **in amount, not in character.** All they did was to make certain what the Bank was denying—its liability to the districts for any indebtedness for what it had done.

It is also urged on behalf of the appellant that the costs included in the judgments so entered should not be allowed in a claim for preference. As stated, these suits were brought while the Bank was solvent, to determine the liability of the Bank to the districts, which it was denying. To institute those suits the districts were compelled to advance to the clerk of the court, in each case, fees aggregating $10, (Idaho Compiled Statutes, Sections 3702, 3713), and to the officer for serving summons, $1.40. (Idaho Compiled Statutes, 3704).

These claims, as to principal, costs, and interest up to Nov. 21, 1931, that being the day the Bank became insolvent and when the Receiver took charge, were legal and valid charges against the Bank growing out of its handling of the trust funds belonging to the school districts.

In the matters mentioned in their pleadings in the two suits set forth in the record herein the several school districts were entirely free of blame and we feel that they are entitled to the relief asked for by

them and as given by the orders and judgment of the District Court.

Respectfuly submitted,
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Service of the foregoing Brief of Appellees acknowledged by receipt of a true and correct copy thereof, this.....day of May, 1933.

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